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No. 573

In the

Supreme Court of the United States

OCTOBER TERM, 1956

LaVerl Johnson and Joleen Johnson, husband and wife, and Pacific Fruit Express Company,

Petitioners,

v.

Union Pacific Railroad Company, a corporation,

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

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To the United States Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 11, 1956.

OPINIONS BELOW

The district court filed no reported opinion. The opinion of the court of appeals (App. A, *infra*, pp. 46-55) is reported at 233 F. 2d 427.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1956 (App. A; *infra*, p. 56). Timely petition for rehearing was filed July 9, 1956, and rehearing was denied on August 3, 1956 (App. A, *infra*, p. 57). By order of Mr. Justice Douglas, dated October 5, 1956, time for filing petition for writ of certiorari was extended to and including November 15, 1956 (App. B, *infra*, p. 57-58). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the provisions of the 7th amendment were violated in a negligence action where the Court of Appeals reversed judgment for Plaintiff entered on a jury verdict and remanded with directions to enter judgment for Defendant, there being no speculation as to the cause of injury to the Plaintiff where the supplier of 12,500 volts of electricity continued to supply energy to substation after knowledge of the hazard to persons such as plaintiff created by the substation's dangerous design and operation and where the Court of Appeals based its conclusions on its own findings that the substation was safe for trained electricians and safe for untrained persons when properly cautioned despite evidence that

showed a substation built in 1925 was so designed and maintained that a pole-top switch, the only disconnecting switch in the enclosure that was labelled as such or even operable without other apparatus, created the inference it shut off all current in the substation but was misleading and in fact shut off current to the transformers but left a deadly charge of 12,500 volts in uninsulated leads to lightning arresters within 3½ feet of the ground and easy reach of any person within the enclosure who might touch them through accident, or misunderstanding, where the evidence showed such design and lack of protection was in the opinion of experts highly hazardous, was contrary to contemporary practice and custom of other companies, could have been obviated by simple and inexpensive rewiring, by relocation of, or by separate barricades for, the old-type lightning arresters, or by use of "new" type arresters which had been the only type sold since 1927; where the design was also shown to be contrary to the national electric code constituting part of the law of Idaho; where it was the uncontradicted testimony of experts called by both parties, that the substation was unsafe for entry by unqualified persons at any time.

2. Whether the Court of Appeals in reviewing the trial court has deprived plaintiff of his right under the Rules of Decision Act to have his case decided in accordance with the law of Idaho by ignoring the decisions of the Idaho courts with respect to closely related issues establishing:

(a) that title to undetermined goods does not pass until delivery;

(b) that custom and practice are merely evidential

and not conclusive on the question of reasonable care;

(c) that the seriousness of the risks incident to distribution of high-voltage electricity require every known precaution and outweigh considerations of expense to the industry;

(d) that where an independent contractor is employed to perform work involving grave danger and foreseeable risk to others unless precautions are taken, it is the duty of the contractee to take such precautions including selection of a competent contractor.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Rules of Decision Act (28 U. S. C. sec. 1652) provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT

Petitioners, LaVerl Johnson and wife, brought this suit in the United States District Court for Idaho against the re-

spondent, Union Pacific Railroad Company, to recover damages for personal injuries by reason of electrical burns to Johnson, necessitating the amputation of both legs just below the knee and his right arm at the shoulder.

Jurisdiction was based on diversity of citizenship (R. 3). Johnson's employer, Pacific Fruit Express Company, was permitted to intervene as party plaintiff (R. 13).[1]

The complaint alleged that plaintiff, a laborer, in the employ of Pacific Fruit, suffered severe electrical burns through the negligence of defendant in the furnishing of electrical energy and in the operation of an electrical substation located in Pocatello, Idaho.

On trial to a jury, and at the close of all the evidence, defendant's motion for directed verdict was denied (R. 363, 365). The jury returned a verdict for the plaintiff in the amount of $225,000 (R. 19). Defendant's motions for judgment notwithstanding verdict and for new trial (R. 20), were denied (R. 35).

On appeal by the defendant, Union Pacific Railroad Company, the Court of Appeals for the Ninth Circuit reversed with directions to enter judgment for defendant (App. A, *infra*, p. 55).

The principal controversies as to Union Pacific's liability revolved around the issue whether it controlled, solely or jointly, the high-voltage current in the uninsulated and in-

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[1]This was to permit Pacific Fruit to recover as subrogee amounts paid by it to petitioners under the Idaho Workmen's Compensation Act (R. 30).

adequately protected wires at the point of injury; and whether, having knowledge of the hazardous design and operation of the station and of the risk to laborers who were being sent into the substation by Pacific Fruit, their employer, the Union Pacific was liable to plaintiff for its failure to shut off the current which at 12,500 volts would cause serious injury or death to anyone who touched the wire in the substations.

EVIDENCE FOR PLAINTIFF

On the date of the plaintiff's accident, November 4, 1950, the Union Pacific Railroad Company at Pocatello, Idaho, owned and operated an electrical transmission or distribution system including seven substations which, in addition to servicing its own facilities, served those of the Pacific Fruit Express (hereinafter called "Pacific Fruit") as well (R. 349, 161, 114, 115, 189, 210).

Relationship of the parties.—Pacific Fruit is a car-line operator. It has an ice plant or refrigeration department, a car department and a store department at Pocatello (R. 360-361) where it furnishes refrigerator cars and protective service, including refrigeration and heater services, for the Union Pacific (R. 314, 359-360). The substation was built in 1925 under a contract dated March 1, 1924, with the Oregon Short Line Railroad Company, defendant's predecessor railroad operator, for the construction of a substation and the purchase of power (R. 314). The contract, inter alia, recited (Ex. 26; R. 314):

"Whereas, the Pacific (Fruit Express) Company is handling the refrigeration work of and for the Railroad Company at Pocatello, Idaho, and in connection with the handling of said refrigeration desires to secure from the Railroad Company electric power for use in connection with said refrigeration; . . .

and provided (R. 315):

"1. The Railroad Company will construct pole and wire lines and a 600 KVA transformer station *necessary for the delivery of power at approximately 2300 volts and 60 cycles to the Pacific Company hereunder, maintenance, repairs, renewals and changes in said constructions shall be made by the Railroad Company* at the cost and expense of the Pacific Company.

The land for the substation and the transmission linesite connecting with the railroad distribution line was covered by a lease by Oregon Short Line to Pacific Fruit dated February 23, 1926 (R. 322), and effective as of the date on which, under the contract of April 1, 1924, power was first delivered to Pacific Fruit, i. e. August 28, 1925 (Exhibit 27; R. 322, 324).

This lease was supplemented by another between Oregon Short Line and Pacific Fruit, dated July 19, 1932 (Exhibit 28, R. 326, 332). This grants only a license for the transmission line (R. 327)[1] and it expressly limits lessee's

[1]The description and map attached to Exhibit 28 show that the tracks of the railroad extend in a northwest-southeasterly direction at this point; that from the railroad-owned switches on the junction pole on the railroad's power distribution line (R. 161, 281-282, 286-287, 342) on the northeast side of the tracks (called the Batiste transmission line) the Pacific Fruit feed line extends southwesterly 191 feet across the tracks, to the Pacific Fruit substation where Johnson was injured (R. 281-282), a fenced rectangle, 22 by 15 (R. 325) enlarged to 33 by 31 feet in 1942 (R. 123-124, 284, 336-338).

use of the leased premises to the purposes essential to the Express Company's services to the Railroad (R. 329). By supplemental agreement of November 24, 1942, the area leased for the transformer station was enlarged, the rent increased, and the Union Pacific, as lessee of the railroad from Oregon Short Line, was included with Oregon Short Line as lessor of the substation site (Exhibit 29; R. 336, 338).

The Union Pacific transmitted energy to the seven substations in its system, including that of Pacific Fruit, at 12,500 volts (R. 349). There were disconnect switches on the junction pole owned by Union Pacific (R. 287) where the Pacific Fruit's 191-foot feed line to the substation connected with the Railroad's Batiste line (R. 282, 286, 342). Within the substation enclosure, the current of 12,500 volts was stepped down by three transformers for delivery at 2,300 volts as specified in the contract, then metered at 2,300 volts to determine the amount of energy delivered to Pacific Fruit, and thence transmitted to another separate enclosure at the ice plant (R. 114-115, 167, 281, 362). The meter was read monthly by the electrical shop foreman for Union Pacific (R. 114). The Pacific Fruit purchases the electricity from defendant (R. 210) and is billed monthly (R. 211).

The substation is enclosed with a high wire fence (R. 123, 166) and is kept locked (R. 167, 169) with a key kept by the manager of the Pacific Fruit ice plant (R. 284).

Injury to plaintiff.—On November 4, 1950, the date of the injury, plaintiff was employed by Pacific Fruit Express as a minor repairman and painter (R. 107, 225). He had

very little knowledge of electricity and had never worked around high voltage electricity (R. 107). His superiors were Harold A. Shoup, Superintendent of Pacific Fruit at Pocatello (R. 123, 209-210, 224) and Howard Johnson, Assistant Plant Manager (R. 224), who had died prior to the trial (R. 123, 140). Just before noon, H. O. Johnson gave plaintiff the keys to the substation cage where the accident occurred; he told him to paint all the wires he could reach (R. 108, 128, 226-227, 231). He further told him that was the only day the power would be off and that the power was off (R. 109). After lunch, plaintiff unlocked the cage on the west side of the enclosure (R. 227) and started to paint the southernmost of the lightning arresters arranged along the east side of the enclosure (R. 110, 142, 167-168). The first wire he touched caused his injury and he woke up in the hospital (R. 110). His legs were amputated six inches below the knee and his right arm three inches below the shoulder joint (R. 146). Further amputations were necessary (R. 147, 149). Plaintiff's injuries, present condition and probable future condition were all in evidence (R. 45-113).

Immediately after the accident, it was found that the pole-top switch in the substation was open but the disconnect switches to the lightning arresters were not open and wires running into the four lightning arresters (one of which was grounded) set about 3½ feet above the ground were still "hot" at 12,500 volts (R. 162). The pole-top switch cut off current only to the transformers (R. 163). Most fea-

tures here pertinent can be seen in the photo (Ex. 16, App. C, *infra*, p. 59).

The pole-top switch, really three switches together, and known as a gandy-operated pole-top switch (R. 174) was located at the top of a frame between the transformers and the lightning arresters and was connected by a rod with an operating device or handle at a convenient height above ground level for turning it (R. 164). It bore a sign "Warning Disconnector Do not operate under load." (R. 190). With it open, or off, the transformers, on the west side of the enclosure, were dead (R. 165), but on the east side connected to the incoming line and connected ahead of the pole-top switch were the three other wires leading down to the three lightning arresters (R. 165). When the pole-top switch was open, killing energy in the transformers, these lines to the lightning arresters remained "hot" unless the three lightning arrester disconnect switches were also opened (R. 163, 165-166, 170, 175, 182). The lightning arrester disconnect switches were 12 feet above the ground (R. 204, 207) and to open them, it was necessary to use a hot stick (R. 175), a specially treated pole of wood, equipped with a hook (R. 171-172). No hot stick was in the substation enclosure on the day of the accident (R. 172).[1]

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[1]It was kept in the engine room 150 feet away to keep it dry (R. 286, 295) although a metal container for it a little larger than the stick might have been used in the enclosure (R. 288). Superintendent Shoup and his assistant, H. O. Johnson, had authority to use the hot stick (R. 295), but Shoup had never used it except on a secondary bank in another substation adjacent to the ice plant building (R. 298).

Plaintiff's expert witness testified that the substation was hazardous because the pole-top switch with its sign: "Warning Disconnector Do not operate under load" misleadingly created the inference that it killed all current in the station and under the custom and practice of electricians or anyone else, that is what they would have a right to expect (R. 196, 206). There were no warning signs either at the pole-top switch or at the lightning disconnectors or elsewhere indicating that it was necessary to pull the latter as well in order to kill all power in the substation (Ex. 14, 16, 17 and 20; R. 240). With the pole-top switch thrown but the lightning arresters still not disconnected, not even experienced persons could be permitted to come close to the lightning arresters (R. 197) and the substation remained unsafe because bare wires carrying 12,500 volts to the lightning arresters were within 3½ feet of the ground and there was a possibility of tripping or falling on, or reaching for, them (R. 239). There was no separate barrier around the arresters which is contrary to the custom (R. 167, 181). The former state electrical inspector testified that the general practice is to mount the arresters on a high pedestal or beyond reach and accidental contact (R. 180). The foreman for Idaho Power Company confirmed that his company would have barricaded or eliminated the lightning arresters (R. 239).

The safety code also provides that where such conditions

exist there should be barriers in addition to the barrier around the substation itself (R. 180).[1]

Expert Rising testified that the "12,500 volt conductors within reach of any person who might be inside the enclosure, whether authorized or otherwise would be hazardous" (R. 178) because "they might, either through lack of knowledge or misunderstanding or through accident come in contact with them" (R. 179). No one should enter that station except in the company and under the supervision of a qualified person and it would not be safe for any one but a qualified electrician to operate the cutout switches to the lightning arresters (R. 184).

Expert Gilbert testified (R. 239): "No man should have been in that yard unless he was qualified."

Plaintiff's expert witness Smith testified the general practice in the electrical industry, for persons selling electricity through such a substation, under such hazardous conditions, if they observed them, would be to discontinue supply of current (R. 194, 199) and it is their duty to do so (R. 200) because of the hazard to lives and equipment (R. 200).

Dangerous ignorance of Pacific Fruit officers in charge of access to the dangerous substation.—Shoup, the plant man-

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[1]National Electrical Code Handbook 32 (Ex. 24) sections 93-C, and 35, Idaho Code, Sec. 54-1001 enacted in 1947 requires that from and after the effective date of the Act all installations of wires and equipment shall be made in substantial accord with the Code. National Bureau of Standards Handbook H 32 "Safety Rules for the Installation and Maintenance of Electrical Supply and Communication Lines comprising Part 2 and the Grounding Rules of the Fifth Edition of the National Electrical Safety Code" (Ex. 24, R. 212) requires barriers, etc. [as in body] section 93-C.

ager or superintendent of Pacific Fruit plant since September 1949 (R. 209, 292) admitted that until this accident he, too, had believed that the pole-top switch cut off all the energy in the substation (R. 299).

H. O. Johnson, his assistant, had just before noon (R. 108) given plaintiff the assurance that the power was off (R. 109) after having been present in the morning when the pole-top switch, but not the lightning arrester switches, were pulled (R. 302-303, 304, 308, 310). Pacific Fruit laborers were there cutting weeds at the time (R. 303, 309), but they were merely warned (R. 310).[1]

Pacific Fruit since as early as 1947 had employed no electrician at this place and there were none at the time of the accident (R. 117, 125, 294, 300, 351).

Measures available to eliminate danger.—The manager of the Gem State Electric Company and others testified the hazard presented by the design that prevented operation of the pole-top switch from shutting off current in all parts of the station could have been remedied:

> (1) By running the three wires another 5 or 6 feet so as to connect the lightning arresters to the "load" side rather than on the "feed"[2] side of the pole-top switch (R. 176-177, 244-245).
>
> (2) By putting the lightning arresters outside of the substation (R. 177).

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[1]The testimony does not state whether H. O. Johnson heard the warning or who gave it. H. O. Johnson was dead at the time of the trial.

[2]See R. 175-176.

(3) By following the general practice to put them on a high pedestal or beyond reach and accidental contact (R. 180, 239).

(4) By following the safety code by providing additional barriers around the arresters (R. 180).

(5) By using pellet type arresters, sold since 1927 to exclusion of old types used in the substation, mounted on tops of poles, eliminating hot wires coming down within reach of the ground (R. 201-202, 242-244).

Knowledge by Union Pacific of hazardous conditions.— Each of the hazards and dangers of this substation were readily observable by any qualified electrician (R. 181, 192, 195-196, 197, 206).

Despite these conditions, prior to the date of the accident, November 4, 1950 (R. 118, 121, 125), Pacific Fruit laborers on several occasions had been let into the substation enclosure to cut weeds or spread gravel (R. 119, 125-126) by Shoup, the Pacific Fruit Superintendent or H. O. Johnson, his assistant (R. 122-123, 132) at the same time a Union Pacific Railroad electrician was working in there (R. 119, 120-121, 123, 129). The laborers had also seen Union Pacific Railroad trucks around the substation at other times (R. 120-121). Eskelson, the electrical foreman at the shops of the Union Pacific at Pocatello (R. 113, 350), for the Railroad had been reading the meters for current delivered to Pacific Fruit at least once a month for seven years at a meter located inside the substation enclosure.

Employees of Pacific Fruit were instructed that in the event of electrical difficulties, they should call the railroad

telephone number written on the engine room wall in the ice plant (R. 117-118, 127, 133, 137-138), and they would ordinarily contact Taylor, the electric line crew foreman (R. 343). If Pacific Fruit needed electricians and called him, either day or night, somebody would be furnished to them (R. 355).

Union Pacific Railroad electricians were generally called about electrical difficulty at the plant (R. 133, 137, 171). They came to the plant and did the electrical work, and were consulted concerning equipment (R. 117, 292, 305). They admittedly had been in the substation enclosure (R. 350). Defendant's witness, Taylor, lead electrician at Pocatello in charge of 11 electricians in the line or road gang of defendant on the date of the accident, had become familiar with the substation by seeing it, observing it and going into it (R. 341, 349).

Prior to the accident on at least two different occasions electricians from the Union Pacific shops came to the plant (R. 161). Indeed, on the morning of the accident, H. O. Johnson, before turning off the power, waited for a man he introduced as a Union Pacific electrician (R. 133-134, 138-140) and was later in the morning seen working at the substation cage with a man who was not a Pacific Fruit employee and who drove off in a truck marked "U. P. Railroad Maintenance of Way" (R. 125, 129, 214-215, 230, 233).

INSTRUCTIONS AND RULINGS BY TRIAL COURT

The trial court properly instructed the jury that plain-

tiff's claim was based on the alleged negligence of defendant in the furnishing of electrical energy and in the operation of the electrical substation (R. 368); that where a company furnishing electricity to consumer's wires which it did not install and does not control, had or should have had knowledge of a hazardous and dangerous condition of wiring and appliances maintained by a customer, and continues to furnish such current with such knowledge, if injury occurs by reason of such hazardous conditions, the company is liable for injuries occurring as the proximate result of furnishing such current (R. 376).

The court also instructed that negligence consists in the doing of some act which a reasonably prudent man would not do under the same circumstances (R. 370); that "ordinary" or "reasonable" care are relative terms and the greater the danger, the greater the care required (R. 371); that since electrical energy is one of the most destructive agencies, those engaged in its operation or distribution are held to the exercise of "the highest degree of care and diligence to avoid injuries to persons who might lawfully but accidentally or otherwise come in contact with its wires carrying electricity" (R. 375).

The jury returned a verdict for plaintiff in the amount of $225,000 (R. 19). Defendant's motion for directed verdict at the close of all the evidence (R. 363) had been denied (R. 365). Motions for judgment notwithstanding the verdict and for new trial (R. 20) were denied (R.31-35) Judgment for plaintiff was entered accordingly (R. 29).

OPINION OF THE COURT OF APPEALS

On appeal, the Court of Appeals made its own independant reexamination of the facts:

As to the plaintiff's contention that the Railroad still owned the current at the point of injury to plaintiff, the court held (App., pp. 50) the "presumption" would be that title to the electricity passed at the point where control and dominion passed from one company to the other, and the court concluded that this was the point where the incoming wires went into the substation enclosure.

As to joint control by Union Pacific with Pacific Fruit (conceding that if it existed, "Union Pacific is certainly in a dangerous position in the case"), the court held (App. p. 51) that the contract obligated Pacific Fruit to maintain the station and this, with the fact that Pacific Fruit retained the keys, concluded the question.

As to the Railroad's duty as a paid supplier of current, the court said (App., p. 52):

> "We think it possible that there was at least a question of fact whether it was to be anticipated that Pacific Fruit would sooner or later let a man unfamiliar with electricity and safety measures into the enclosure without the switches all turned off. Perhaps it was foreseeable that sooner or later someone would

> get 'mixed-up' with exposed and energized wires running around at points less than full body height'."[1]

The court also recognized the law to be that the supplier of gas or electricity with knowledge has a duty to stop supply to defective equipment and appliances and is liable to third parties injured through breach of that duty, and a duty initially not to turn gas into a leaking stove or current into improperly installed wires (App., p. 53).

However, the court decides the case with its own law of non-duty stated in terms of its own findings of fact, and without regard to the jury verdict based on plaintiff's evidence (App., 53):

> "But we are not convinced that when a customer has an appliance maintained in its orginial condition of repair and function, capable of use by the trained, capable of use with safety by the untrained if properly cautioned, that the supplier has any duty or right to cut off the supply of his product (which he is obligated by contract to supply) because the customer has not modernized his plant and has not put in the latest safety devices, has not rebuilt to a high safety standard."

It held the trial court should have granted defendant's

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[1]This case is digested (30 Gen. Dig. 2d Series No. 3 (Aug. 1956) "Electricity 16(1)") as follows:

"Where railroad sold through substation to fruit express electricity which railroad had purchased, railroad did not have duty to withhold electricity from substation in which fruit express employee was injured, even though station had become outmoded and hazardous to the uninitiated who might be admitted without precautionary instructions".

motion for directed verdict on the ground there was no duty of Union Pacific to withhold electric current here (App., p. 54), and that mandate would be to enter judgment for defendant (App., p. 54). The judgment is merely for reversal (App. A, *infra*, p. 56).

REASONS FOR GRANTING THE WRIT

The decision of the court below involves questions of law of general importance. In the exercise of the reviewing function and in setting aside the verdict of the jury the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to require the exercise of this Court's supervisory jurisdiction.

I.

THE DECISION OF THE COURT OF APPEALS DEPRIVES PETITIONER OF HIS RIGHT TO JURY TRIAL UNDER THE SEVENTH AMENDMENT

The court below set aside the jury's verdict solely on that court's own independent reexamination of the evidence. In determining the issues presented by the motions for directed verdict and for judgment notwithstanding the verdict, it disregarded entirely that its review function was limited to the question of law:

"Whether there was any substantial evidence to sustain the jury's verdict?"

That fundamental limitation, based on the requirements of the Seventh Amendment, has been hammered home by this Court.

However, so far as the court below was concerned, there is no such rule. In form, it gave no recognition to the rule; it did not marshal the evidence in support of the verdict, and it gave no consideration to what inferences might reasonably be drawn therefrom. Neither did it pass on the question whether the jury might on the basis thereof, reasonably have found negligence on the part of the defendant. Instead it stated its own inferences as on a trial *de novo* minimizing plaintiff's case to a mere showing of failure to modernize.

This petition does not, therefore, merely call on this Court again to duplicate the proper function of the court of appeals on review in such cases, and make a second reevaluation of the evidence to sustain the verdict. Since the court below did not even purport to perform that function the error here is more basic and of great general importance.

Here, in complete derogation of petitioner's constitutional right, it usurped the functions of the jury, made a de novo determination and set at naught the standards laid down by this Court to protect against such invasions of the exclusive province of the jury.

It will little avail for this Court to lay down rules for the guidance of the appellate courts in the performance of their review function if such flagrant violations of those rules go unchecked.

The standard for review established by this Court is clear. In reviewing the trial court's refusal to direct a verdict for defendant and denial of defendant's motion for judgment notwithstanding the verdict, the appellate court was called upon only to decide a question of law—Whether there was any substantial evidence upon which the verdict for plaintiff could be sustained? In deciding that question, of course, it was required to assume as established all facts in support of plaintiff's claim that the evidence reasonably tends to prove and to give plaintiff the benefit of all favorable inferences that might fairly be drawn from such facts.[1] *Gunning v. Cooley*, 281 U. S. 90, 94; *Lumbra v. United States*, 290 U. S. 551, 553.

But, once the evidentiary basis for a verdict is apparent, the appellate court's function is exhausted. *Myers v. Reading Co.*, 331 U. S. 477, 485, 486; *Lavender v. Kurn*, 327 U. S. 645, 653; *Tiller v. Atlantic C. Line*, 318 U. S. 54, 67; *Wilkinson v. McCarthy*, 336 U. S. 53, 61. The jury, exclusively, is charged with the ascertainment of facts. The court was therefor without authority to substitute itself for the jury as it did here, to determine contested issues of fact, weigh the evidence and substitute its conclusions for those of the 12 jurors. *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, 386-387; *Baltimore & C. Line v. Redman*, 295 U. S. 656, 657; *Berry v. United States*, 312 U. S. 450, 453; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32-33.

The court of appeals decision disregards the limits im-

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[1]The rule in Idaho courts is the same. McKee v. Chase, 73 Idaho 491, 497; Hill v. Bice, 65 Idaho 167, 175.

posed by the standard.—The court of appeals did not even make formal obeisance to the stated rule. Nowhere did it acknowledge that its function was to decide the question of law. This is not determinative. But it is not without significance when, as here, the court does not purport to summarize the evidence most favorable for plaintiff. Instead, the court's opinion makes its choice of "presumptions" as to when title passed (App., p. 50), and fails to weigh conflicting inferences as to joint control (App., pp. 50-51). The court's view of the evidence as to the defendant's liability as a paid supplier of electric current appears only as part of its statement of what it regards as being the question, and in its statements (negative in form) of the applicable law. Having referred to the testimony that the substation was modern when built in 1925, the court said (App., p. 52):

> "The question is: Did it (Union Pacific) have a duty to stop sending its electricity into the substation, which had become outmoded and a hazard to the uninitiated who might be admitted without proper precautionary instructions.

After conceding foreseeability and recognizing the general rule of law (App., pp. 52-53) the opinion rules as a matter of law (App., p. 53):

> "But we are not convinced that when a customer has an appliance maintained in its original condition of repair and function *capable of use by the trained, capable of use with safety by the untrained if properly cautioned,* that the supplier has any duty or right to cut

> off the supply of his product (which he is obligated by contract to supply) because the *customer has not modernized his plant and has not put in the latest safety devices, has not rebuilt to a high safety standard.*"

There is here no hint of recognition of the court's duty to consider whether there was any substantial evidence adequate to support the inference that the substation was hazardous for all, trained and untrained, whether cautioned or not, and determine what the evidence showed when viewed in a light most favorable to plaintiff. Plainly the court did not consider the evidence from which a jury could properly infer in support of the verdict that the inadequacy of the substation was not mere failure to have the latest safety devices but rather failure to conform to well-recognized standards as to safeguards customarily used in the industry.

The appellate court's statement disregards the pertinent evidence in support of the verdict and resolves all conflicts, if *any, against the plaintiff*.—The evidence of hazards in design and arrangement of the substation is asserted by the court of appeals to have showed merely (App., p. 53-54).

> "An appliance * * * capable of use by the trained, capable of use with safety by the untrained if properly cautioned".
>
> * * * * *
>
> "The equipment can be operated safely by the trained and safely by the untrained if properly cautioned".

1. The evidence in fact was more than adequate to

justify a finding that the substation, carrying 12,500 volts, incorporated features of design and wiring that constituted obvious and unnecessary risks for anyone who entered the substation, dangers that were pointed out by experts, dangers that were inherent in construction and arrangement, violative of contemporaneous practice and custom, contrary to safety and electrical codes and, in an important aspect at least, a lethal trap that found its victim in plaintiff.

(a) The uninsulated wires within easy reach and carrying 12,500 volts rendered the substation hazardous to anyone, qualified electrician or otherwise.

The wires to the lightning arresters carrying 12,500 volts ran within 3½ feet of the ground (R. 162, 181), were bare, uninsulated (R. 162, 181, 239). The wires carrying 12,500 volts to the transformers are only six feet six inches above the ground and are uninsulated (R. 195, 201).

Expert Rising testified (R. 178):

> "It is my opinion that the 12,500 volt conductors within reach of any person who might be inside the enclosure, whether authorized or otherwise would be hazardous" (R. 178): "would be hazardous to any person who might be working inside of that area, because they might, either through lack of knowledge or misunderstanding or through accident come in contact with them" (R. 179).

Gilbert, foreman for the Idaho Power Company testified (R. 239):

"No man should have been in that yard unless he was qualified. The wires were low and there was a possible chance of tripping or falling or reaching to them, that is a hazard that we watch if there is anything hot and a man is in the yard.

Expert Witness Smith testified (R. 195):

"The first hazard upon entering the gate, that I noticed, was the fact that bare conductors were very much in evidence within six feet and six inches of the ground and long before a man approached the disconnector he is going past those hot conductors. He has to turn to the left and again to the right and travel a distance of approximately 30 feet before there is any possible chance of deenergizing any portion of this sub-station . . .

"Entering that sub-station with that much energy is hazardous to any person, until such time as that pole switch is operating, then it is still hazardous after they get around on the other side where the arresters are." (R. 197)

(b) The manner of wiring to the pole-top switch, in combination with the uninsulated high voltage wires to the lightning arresters at a 3½ foot height, constituted a potential death-trap for electricians and non-electricians alike.

Expert witness Smith testified (R. 205):

"My first assumption when I saw that (pole-top) switch from outside the gate, the first time I ever saw the substation a short time ago—this disconnect switch as it is called on the side, is intended to disconnect all of the equipment in the sub-station. . . . That is to be

expected in cases of this kind—that the disconnector is for that purpose—to disconnect all of the equipment in there. I would expect it unless I was cautioned beforehand and then, of course, I would look further, the first impression is that the disconnector would turn off all of the electricity."

"Q. The ordinary standard is, if a man entered there that day, at the time that the picture shows the conditions, and if he saw the pole switch open, he would have a right to believe that all of the energy was out of the sub-station, the lightning arresters and everything else, wouldn't he?

"A. Yes, I would assume that all of the electricity would be off if the pole-top was open."[1]

(R. 196-197) " . . . this (pole-top) disconnector does not state clearly that it turns off all of the equipment in the substation, it merely leaves the inference that this connector does the work, . . . Now, any person operating that disconnect switch with any knowledge, any experienced person about to enter this inclosure should by all means obtain a hot-stick and disconnect those three connectors ahead and above the lightning arresters. Now, in the event that is not done, the inclosure is not safe for another reason, because arresters of this type should have an inclosure within the inclosure, even experienced persons should not be permitted to come close to these arresters in making repairs or adjustments or even reading meters."

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[1]Shoup, the Plant Manager for Pacific Fruit, admitted that this was his belief until the day of the accident (R. 299) although he had charge of the keys to the locked enclosure (R. 293). It was certainly permissible for the jury to infer that H. O. Johnson, the assistant superintendent, labored under the same erroneous belief since he assured plaintiff that all power was off on the day of the accident (R. 109).

(c) The evidence showed that it was unsafe for a non-electrician, whether he be instructed or cautioned or not, to operate the lightning arrester cutout switches.

Plaintiff's expert Rising testified (R. 184):

> "It would be safe (for a non-electrician) to operate the pole-top switch but it would not be proper because no one but a qualified person should enter that sub-station except in company with or in the company of and under the supervision of a qualified person. As far as the cutout switches are concerned I would not consider it safe for anyone but a qualified person to operate them."

(d) The evidence further showed, as detailed above, that unless the lightning arrester cutout switches were opened, the bare 12,500 volt leads to the lightning arresters, only 3½ feet high, made work around them unsafe even for experienced persons (R. 197).

Gilbert, foreman for the Idaho Power Company, testified (R. 239):

> "No man should have been in that yard unless he was qualified."
>
> "At no time would I send a man into that place unless there was a qualified man with him" (R. 246).

Expert Smith said (R. 207-8):

> "In the first place, it is not safe for an inexperienced person to go in there alone, if there is energy there at all an inexperienced person should not go alone."

There was thus ample and clear evidence that the substation was hazardous for qualified electricians and non-electricians alike. Certainly, the evidence was more than adequate to support conclusion by the jury that the substation was not capable of safe operation by a non-electrician, whether or not he was properly cautioned. Even if there were conflict on this point, and we know of none, it was not for the court to resolve. This was for the jury alone. *Gunning v. Cooley*, 281 U. S. 90, 94; *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, 68; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35-36.

As shown above, the description of the physical set-up station was sufficient in itself to base a finding of extreme and unnecessary hazard but the uncontradicted evidence went much further. There was testimony that the pole-top switch could have been arranged to cut all power in the station either simply by using five or six more feet of wire and tying in or tapping the lightning arresters on the other side of the pole-top disconnect switch (R. 177, 244-245) or by putting the lightning arresters outside this enclosure (R. 177).

There was evidence of general practice:

> "It is the general practice where this type of arrester is used, or a similar type, to mount them on a high pedestal or to put them beyond reach, and beyond accidental contact." (R. 180)

The safety code also provides that there shall be barriers in addition to the barriers around the substation itself (R. 180).

"As to the condition of safety there were no barriers around the hot conductors and they did come down within approximately three and a half feet of the ground, which would be not according to the custom." (R. 181)

2. The court of appeals disregarded plaintiff's evidence as to standards of reasonable care and made its own finding of fact, i.e. that the evidence showed merely that the customer buying the electricity did not—

"put in the latest safety devices, has not rebuilt to a high safety standard"

or

"modernize his equipment to comply with improved safety developments". (App., pp. 53-54).

As shown above, the mere description of the physical set-up of the substation was sufficient in itself to justify a jury finding of extreme and unnecessary hazard but the uncontradicted evidence went much further. There was testimony that the pole-top switch under the custom and practice of electricians or anyone else would be expected to disconnect all equipment in the substation (R. 206).

It was improper in November, 1950 to furnish electricity of this voltage to the substation with those arresters because the installation, the method of installation, was more hazardous than the arresters themselves (R. 202).

Under the same circumstances, in the Idaho Power Company, if there had been such a substation, the company

would have either barricaded or eliminated the lightning arresters with the wires so low that there was a possible chance of tripping or falling or reaching to them (R. 239).

There are three other identical substations in the Pocatello area. Only one has lightning arresters located in the same way without barriers, without being placed out of reach (R. 240-241). It is at Batiste Spring. The Union Pacific owns it (R. 241).

The old "dry-type" arrester used in this substation (R. 243) is not standard equipment; it was virtually abandoned by power companies in the 20's (R. 201). "Along in the 20's, about '27, the pellet type of arrester came into use and since then I don't know of any company that ever sold this type of arrester." (R. 202).

The general practice in the electrical industry of one who was furnishing electricity through such a substation under such conditions if they observed them makes it incorrect to continue to supply current under known hazardous conditions (R. 194, 200). It is their duty to refuse (R. 200).

The design and construction thus were shown to be hazardous, not merely for lack of new-type lightning arresters which had been evolved in 1927 and not merely by standards of new techniques developed since 1925. The hazards in the substation arose from failure initially simply to use an additional 18 feet of wire to hook in the three lightning arresters on the load side of the pole-top switch; from failure to move or barricade or elevate the old type lightning arresters with uninsulated wires carrying 12,500 volts with-

in reach of anyone who might touch or reach for them through mistake, ignorance, or accident.

Rewiring to the load side of the disconnect switch elevation of the arresters, separate barricades for them or their removal outside the main enclosure to a separate enclosure were not merely "modern techniques" of "today" nor were they merely "new" methods or "latest" safety devices. They were shown to be called for by ordinary prudence and by the standards of operation of other companies and in the industry as well as by the electrical safety code.

This evidence of the failure to have any of these safeguards, coupled with the showing of knowledge by the Union Pacific[1] of the hazards of the design and of the lack of training of those working in the substation were, even if there were conflicts—and we know of none—all required to be assumed by the appellate court to be true in passing on the motion.

Relying as it does on its own independent evaluation of the record as showing merely a failure of the customer to modernize and adopt the latest safety devices, the court below in its decision plainly violates the rules prescribed by this Court and required by the Seventh Amendment.

Because it failed even to take account of much of the

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[1]In acknowledging foreseeability (App. pp. 52-53) the court of appeals impliedly recognized—and it did not otherwise negative the adequacy of the evidence to show—knowledge by the Union Pacific, through its employees, that non-electricians were working in the substation with the lightning arresters not disconnected. The evidence on this point is sufficiently detailed above. (pp. 14-15).

most vital evidence for plaintiff, much less view it in the light most favorable to plaintiff, the decision of the court below requires review by this Court.

This court has from the beginning recognized its duty most zealously to guard the right of trial by jury as a basic and fundamental feature of Federal jurisprudence and that even a seeming curtailment of the right must be scrutinized with the utmost care. *Baylis v. Travelers Ins. Co.*, 113 U. S. 316, 321; *Jacobs v. New York City*, 315 U. S. 752; *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 354; *Wilkinson v. McCarthy*, 336 U. S. 53, 71 (Concurring opinion). It held in the *Tennant* case *supra*, pp. 35-36, there is no reason why this Court should abdicate its "duty to protect and guard that right."

II.

THE COURT OF APPEALS HAS DECIDED QUESTIONS OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH PERTINENT IDAHO DECISIONS AND WITHOUT REFERENCE TO THEM, AND, IN ASCERTAINING THE LAW GOVERNING THE DUTY OF RESPONDENT HAS SO FAR DEPARTED FROM THE SETTLED COURSE OF JUDICIAL PROCEEDINGS AS TO REQUIRE CORRECTION BY THIS COURT.

Insisting on full observance of the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64, this court in *West v. American T. & T. Co.*, 311 U. S. 223, said (p. 236):

> "State law is to be applied in the Federal as well as the state courts and it is the duty of the former in every case to *ascertain from all the available data what the state law is and apply it* rather than to prescribe a dif-

ferent rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the Federal courts. * * *" (Emphasis supplied).

In *Angel v. Bullington*, 330 U. S. 183, 191, this Court pointed out that enforcement of state policy was the essence of diversity jurisdiction. Applying that rule, the lower courts generally have recognized as available data the considered dicta of state courts (*Mattson v. Central Electric and Gas Co.*, 174 F. 2d 215, 221-222, 8th Cir. 1949); the rationale of the state cases (*Jackman v. Equitable Life Assur. So. of United States*, 145 F. 2d 945, 947 ((3d Cir. 1944); *Spielberger v. Textron Inc.*, 172 F. 2d 85, 87 (2d Cir. 1949). Any persuasive data that is available such as compelling inferences or logical implications from other related adjudications and any convincing manifestation of local law having a clear root in judicial conscience and responsibility should be given heed (*Yoder v. Nu-Enamel Corporation*, 117 F. 2d 488, 489 (8th Cir. 1941); *Cold Metal Process Co. v. McLouth Steel Corp.*, 126 F. 2d 185, 188 (6th Cir. 1942); and state policy whether it arises from statutes, rules or decisions of the state courts must be given effect (*Martineau v. City of St. Paul*, 172 F. 2d 777, 780 (8th Cir. 1949); *Griffin v. McCoach*, 123 F. 2d 550, 551 (5th Cir. 1941).

Assayed by these principles, the absence in the opinion of the court below of citation of Idaho authorities as basis for decision would create the impression that no Idaho decisions have any pertinence. However, the state is not a judicial vacuum on the issues presented. In failing to take into account the Idaho decisions on closely related issues the decision of the

court below ignores the Rules of Decision Act and the principles established by this Court to safeguard its observance.

The court below announced its conception of its duty to be to reason the case along the lines it thought "would appeal to an Idaho court" (App., p. 51). Before it reached that point in its decision, however, it had already decided a matter of property law, namely the place or time at which ownership of the energy passed, without reference to the Idaho statutes or decisions.

> A. The court of appeals failed to consider Idaho law governing time of passage of title to unascertained or future goods or property.

The Court held (App., p. 50):

> "* * * Here there is nothing in the contract clearly delineating at which spot in the wire electricity became the property of Pacific Fruit. Under such circumstances we would think the presumption[1] would be that the title to the electricity passed at the point where control and dominion of the electricity passed * * *. Surely, this would be not later than the point where the incoming wires went into the substation enclosure".

The court was evidently referring to Defendant's Ex. No. 26[2] (R. 314) providing, inter alia:

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[1]This language emphasizes the court's failure to recognize that its function was only to determine what it was reasonable for the jury to presume in favor of plaintiff.

[2]Defendant contended this contract expired by its terms on April 28, 1929 (R. 321). But defendant's witness testified that Pacific Fruit operated the station (R. 294) under a written agreement with Union Pacific (R. 299). There being no other contract as to operation, in evidence, the appellate court apparently inferred successive implied renewals of the contract by the parties. See Corbin on Contracts, Sec. 18, p. 36.

> "1. The Railroad Company will construct pole and wire lines and a 600 KVA transformer station necessary for the delivery of power at approximately 2300 volts and 60 cycles to the Pacific [Fruit] hereunder. * * *
>
> "2. The Pacific [Fruit] Company agrees to receive power at a point of delivery to be agreed upon between the parties hereto and at its own expense to install and maintain all equipment necessary for the application of said power beyond the point of delivery."

Petitioner does not question the propriety of treating electrical energy as a fluid like water or like gas, or to its treatment as the subject of ownership and sale.[1] But if it is to be treated as property, it should be recognized that an agreement for the sale of electric energy to be delivered at a specified voltage, billed and paid for monthly on the basis of meter readings and in fact taken only at 2,300 volts, is an agreement for property to be manufactured to order.

While the precise point of delivery was not fixed by the contract, it was, of necessity made certain by the contract that the point of delivery could not be before the energy flowed from the transformers since that was the first place that electricity at the specified 2,300 volts came into existence or was manufactured. Petitioner's injury of course was received from the 12,500 volt current at a point prior to entry of the higher voltage into the transformers.

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[1]Ashwander v. T. V. A., 297 U. S. 288, 330 (1936); Utah Power and Light Co. v. Pfost, 286 U. S. 165, 179-181 (1931) aff'g 54 F. 2d 803. In the latter case this Court and the district court dealt similarly with the generation and transmission of electric energy, this Court analogizing it to "manufacture to order of goods and their immediate shipment."

As a matter of state law, the court could not rightly hold that title changed at any point earlier than where the current cleared the transformer.[1] Idaho adopted the Uniform Sales Act in 1919, at least five years before the contract was entered into. Section 64-201 of the Idaho Code (Uniform Sales Act, Sec. 17) provides:

> *"No Property Passes until Goods are Ascertained.*
> "Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained * * *"

Section 64-203 of the Idaho Code (Uniform Sales Act, Sec. 19)[2] provides:

> *Rules for Ascertaining Intention.*
>
> "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as

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[1]As the court below impliedly recognized, the point where control of the energy shifted from Union Pacific to Pacific Fruit is highly important. The cases are uniform that if the energy was still owned by Union Pacific at the point of injury, regardless of who owned the wire, Union Pacific was under a duty to maintain the wire so as to protect those who might come in contact with it. Ohio Power Co. v. Beck, (Ohio) 199 N. E. 860, 861; Daltry v. Media Elec. Light Co., 208 Pa. 403.

[2]The agreement in question does not state where it was executed. If respondent protests that it should be construed under the law of Utah the state of incorporation of Pacific Fruit, Oregon Short Line, and respondent, or under the law of California, home office of Pacific Fruit Express, or Nebraska, the home office of Union Pacific, the answer is that the Uniform Sales Act has been adopted in all three States. (California Civil Code secs. 1737-1739; Nebraska Rev. Stats. 1943, secs. 69-417, 69-419; Utah Code, 1943, secs. 81-2-1 and 81-2-3 (Utah Code 1943, secs. 60-2-1, 60-2-3).

to the time at which the property in the goods is to pass to the buyer: * * *

"Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressd or implied, and may be given either before or after the appropriation is made.

* * *

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

The decision in *Bowman v. Adams*, 45 Idaho 217, 261 Pac. 679 (1927) makes delivery the *sine qua non* of the passage of title, as does *Brown v. Herrick*, 34 Idaho 171, 175, 200 Pac. 117.[1]

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[1]Bowman v. Adams, supra, dealing with the sale of sheep, the court stated (p. 225): "* * * Section 19 of the Uniform Sales Act (C. S., Sec. 5691) provides that, unless a different intention appears, if a seller is bound to do something to the goods to put them into a deliverable state, the property does not pass until such things be done, or if the contract requires the seller to deliver the goods to the buyer, it does not pass until the goods have been delivered." In Brown v. Herrick, supra, dealing with logs, the court said (p. 175): "While the question of the passing of title is not always easy of solution, we think this case falls within the general rule that where the contract of sale provides that the seller shall deliver the property sold at some place specified and receive payment on delivery, title does not pass until such delivery. * * *

"Our opinion on this question has been given the approval of the legislature. * * *"

Under Rule 4 (1) goods of the specified description and in a deliverable state did not exist until after the current had passed through the transformer and been reduced to 2,300 volts. If Rule 5 is applied, title did not pass until the electricity had passed through the transformer for that was the first point at which the goods constituting the subject of the contract came into existence in the form specified in the contract.

Thus the court of appeals in holding that the current that injured petitioner was not owned by Union Pacific decided a pivotal point in the case not only in disregard of the evidence but without reference to statutory and decisional Idaho law having an obvious bearing thereon.

B. The court below failed to take into account Idaho decisions as to the effect of evidence of conformity with standard practice and of failure to adopt latest safety devices.

The court below apparently attached much significance to its finding that "the equipment and wiring for the day it was built was modern" (App., p. 48).

In its conclusion that defendant could not be held liable for refusal to supply electricity to a customer who "has not modernized his plant and has not put in the latest safety devices" (App., p. 53), it apparently gives great, if not conclusive weight to testimony that the substation was "standard" when built in 1925 (R. 236, 246). In so doing, the court disregarded the holding of the Idaho courts:

> "Custom or usage does not determine ordinary care, but the standard thereof is what a reasonably prudent man would do under like circumstances." *Splinter v. City of Nampa*, 70 Idaho 287 ; *Albrethson v. Carey Valley Reservoir Co.*, 67 Idaho 529, 538; *Chase v. Washington Water Power Co.*, 62 Idaho 298, 305).

The court's implied finding of fact that the evidence showed merely a failure to install the latest safety devices, of course, is, as we have demonstrated, another instance of its usurpation of the jury's exclusive power. Assuming the correctness of the fact finding, however, the conclusion of law that there was no duty to install latest safety devices is open to question under the Idaho decisions all of which are ignored by the court. Idaho decisions apply the rule that "Electricity is recognized as one of the most destructive agencies we have, and the highest degree of care and diligence is required by those who are operating electrical plants." *Younie v. Blackfoot Light & Water Co.*, 15 Idaho 56. Where high voltage currents are used and the possibility of serious harm or death is great, the duty of care is but little short of that of insurer. In *Chase v. Washington Water Power Co.*, 62 Idaho 298 (1941), the court said:

> "The care to be exercised by an electric company with respect to its wires is such as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise under the circumstances in order to prevent injury. *Scott v. Pac. Power and Lt. Co.*, 35 P. 2d 749. Wash.).

In the *Scott* case, the Washington supreme court ruled:

> "Where death or serious injury may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it".

In *Chase v. Washington Water Power Co.*, 62 Idaho 298 (1941) the Idaho supreme court applied this rule in full vigor. There two fighting chicken-hawks apparently bridged the standard 28 inch gap between a transmission line and a guy wire. From the guy wire the current flowed to a fence, that had been permitted to lean against it, and on to buildings which were burned. Negligence was found in permitting the uninsulated guy wire to remain in contact with the fence. The evidence showed standard construction did not require guy wire insulation and that it would be impracticable on such high voltage lines. The defendant also argued that enforcement of the suggested spacing of guy wires from all fences a distance equal to that which separates them from the transmission lines would entail tremendous expense to the industry. But the court held (R. 307):

> "The fact insulation of its guy wires, or maintaining a sufficient space between such wires and the wire fence might have been expensive would not excuse appellant from using the highest degree of care in protecting the same * * *
>
> "The authorities are numerous that where, conditions or locations considered, it would be dangerous to have electric wires uninsulated, failure to insulate would be negligence".

Thus, even on the court's finding of mere failure to install the

latest safety devices, coupled with its acknowledgment that there was a foreseeable hazard to the uninitiated who might be admitted to the substation (App., p. 52), there was available data as to the state law which, under the rules announced by this Court, were required to be at least considered by the court of appeals.

C. The court of appeals ignored the Idaho rule that the required care varies with the gravity of the risk. The court below suggested that to here hold respondent for failure to cut off its high voltage current would be to make a jury question of any instance of a supplier selling electricity to a consumer who had an old-fashioned electric heater in which a child might easily get his fingers.

Aside from the distinguishing factor of notice, it would seem to have been pertinent on this point for the court at least to consider the Idaho cases expounding the general rule to the effect that the amount of care to be exercised must be commensurate with the gravity of the risk connected with the activity. *Eaton v. City of Weiser*, 12 Idaho 544, 554, 86 Pac. 41; *Splinter v. City of Nampa* (1950) 70 Idaho 287; *Chase v. Washington Water Power Co.*, 62 Idaho 298. Failure to consider this rule of the Idaho cases was obviously a factor in the reasoning by which the court reached its decision.

D. Idaho decision on duty and liability of one employing an independent contractor was ignored. The destructive character of electric energy and the corresponding, commensurate responsibility placed on those dealing with it, was also

highly pertinent to the consideration of control. Whether or not respondent had active control, did it have the duty to control? The arrangement between respondent and Pacific Fruit Express is highly suggestive of the relation of principal and independent contractor. As the opinion suggests, and the prime agreement states (R. 314) Pacific Fruit was handling the refrigeration work "of and for the Railroad Company * * * and in connection with the handling of said refrigeration" desired to secure electric power from respondent's predecessor in connection with said refrigeration. The highest court of Idaho holds that where one engages a contractor to carry out an undertaking involving hazard he must exercise some care in the selection as to fitness and ability to operate safely.[1] In view of the ignorance of Pacific Fruit's plant manager as to the functions of the respective switches (R. 299) as well as of the hazardous layout of the substation itself the circuit court might well have arrived at a *different conclusion* had it given weight to this Idaho decision.

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[1]Joslin v. Idaho Times (1939) 60 Idaho 235, 91 P. 2d 386 The cited case involved traffic injuries inflicted by a distributor of news papers. After determining that motoring involved danger, said:

> "* * * It appears to be generally accepted that one employing a contractor to engage in a hazardous employment at least must exercise some care in the selection as to fitness and ability to operate safely, and failure to do so will impose liability for the contractor's negligence."

While the decision does not expressly so state, it seemingly holds that once the hazardous nature of the undertaking is established the principal has the burden of coming forward with the evidence that care in employing was exercised.

Cf. similar Tennessee rule applied to transmission of electricity in Pierce v. United States, 142 F. Supp. 721, 728.

III.

THE JUDGMENT OF THE COURT OF APPEALS DEVIATES FROM THE SETLED PRINCIPLES APPLICABLE TO REVIEW OF DETERMINATIONS OF LOCAL LAW

On questions of local law this Court pays "great deference" to the views of the judges of the district courts who are familiar with the intricacies and trends of local law and practice. *Reitz v. Mealey*, 314 U. S. 33, 39; *Hillsborough v. Cromwell*, 326 U. S. 620, 630. Particularly is this true where, as here, the judge is a member of the bar of the State the law of which is in question. *Bernhardt v. Polygraphic Co.*, 350 U. S. 198, 204. In the Eighth and Tenth Circuits, these principles have been formulated in the rule that in determining prevailing state law, where no state court has definitely settled the question, the decision of the federal district court of the particular state within which it is located should not be overruled unless the appellate court is convinced that the determination is clearly erroneous *Abbott v. Arkansas Utilities Co.*, 165 F. 2d 339, 340 (8th Cir. 1948); *Milton v. Granite State Fire Ins. Co.*, 196 F. 2d 988, 992 (10th Cir. 1952).

The considerations underlying these rules have full impact here. The district judge has been a member of the Idaho bar since 1904 and served as Governor before appointment to the District Court for Idaho in 1943. None of the members of the court of appeals who participated in this case was a member of the Idaho bar.

The trial court instructed the jury on the duties of a seller of electric energy to those coming into proximity with the customer's equipment (R. 374-376), the precise, ultimate question determined by the circuit court of appeals. He filed a written opinion when he overruled the motions for new trial and for judgment notwithstanding the verdict. (R. 31-35). Hence, it is evident that the instructions as given were not only the result of his long experience in the jurisprudence of Idaho but reflected his considered judgment, free from the stress of trial. It might also be noted that respondent's attorneys neither moved for a new trial nor urged as error on appeal any instruction remotely resembling the delineation of a seller's duty enunciated by the circuit court.

The opinion of the court of appeals displays no slightest basis for deeming the trial court to have erred in deciding any question of law. It fails to consider relevant Idaho law and invokes no general common law not consonant with the trial court's determinations of Idaho law.

IV.

THE GENERAL IMPORTANCE OF THE QUESTIONS HERE INVOLVED MAKES IMPERATIVE THE EXERCISE OF THE CERTIORARI JURISDICTION

In the exercise of its discretionary jurisdiction, this Court has long emphasized the continuing importance of its vigilance to preserve in the jury the exclusive power to weigh the evidence and determine contested issues of fact. The in-

ability of the court to distinguish between the degree of care reasonable for protection against serious injury or instantaneous death from a 12,500 volt current and that reasonable as safeguard against the hazards of a 110 volt electric heater betokens the wisdom of this court's solicitude.

In the administration of justice, the benefits of the jury's composite knowledge of every-day affairs are indispensable. Here, however, it is submitted that the lower court's failure even to note, much less observe, the constitutional limitation on its review function requires the exercise of this Court's supervisory power.

Additional reason for certiorari here is presented by basic principles of orderly judicial procedure. If the Rules of Decision Act is to attain the goal envisioned in this Court's decisions, it is submitted that the considered judgment of the federal district court, which also sat as another state court, may not be allowed to be overturned until there is produced some ground for questioning its correctness.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE R. PHILLIPS
LOUIS F. RACINE, JR.
B. W. DAVIS,
Pocatello, Idaho
WILLIAM D. DONNELLY,
Washington, D. C.

November, 1956

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a Corporation,
Appellant,
vs.
LAVERL JOHNSON AND JOLEEN JOHNSON, Husband and Wife, and PACIFIC FRUIT EXPRESS COMPANY, a Corporation,
Appellees.

No. 14,498
May 11, 1956

On Appeal from the United States District Court for the District of Idaho

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Before: STEPHENS, FEE and CHAMBERS, Circuit Judges.

CHAMBERS, Circuit Judge:

Plaintiff LaVerl Johnson on November 4, 1950, received a terrific shock from electricity while working in a transformer substation of the Pacific Fruit Express Company at Pocatello, Idaho. He, as a laborer of Pacific Fruit, had been sent by his supervisor into the enclosure surrounding the substation to do some painting. Not knowing that wires which were part of the lightning arrester mechanism carried a powerful load of high voltage electricity, he came in contact with one of the wires. As a consequence of this, he had to suffer the amputation of both legs below the knees and of his

right arm close to his shoulder. It is hard to imagine a more serious injury.

Plaintiff receives a certain modicum of compensation under the Idaho industrial compensation statutes which is charged against his employer, Pacific Fruit Express. Moreover, in the U. S. District Court in Idaho he sought and recovered judgment against the Union Pacific Railroad Company, a corporation and citizen of Utah, in this diversity case. His jury award was the sum of $225,000. Naturally Union Pacific has appealed.

Pocatello seems to be a junction or division point on the railroad. At least, we glean from the record that the servicing operations of both the railroad and Pacific Fruit are rather extensive at Pocatello. There Pacific Fruit re-ices refrigerator cars in transit. Johnson did many jobs about the place, but he was not an electrician and seems to have known little about the dangers in an old fashioned sub-station, which this was.

First, we should relate the history of the transformer station. For reasons of economy, an arrangement was made in 1925 between the Oregon Short Line Railroad, (the predecessor company of Union Pacific) and the Pacific Fruit Express that the railroad would buy all of the electricity at Pocatello needed for the two. The wiring would be rearranged and Pacific Fruit would take electricity off of the Union Pacific line, thence through a transformer located within an enclosure, then to a meter, and then over a line running to places of consumption by Pacific Fruit. This arrangement

had the approval of Idaho Power Company, the utility supplying the electricity.

Oregon Short Line built the sub-station containing the transformer within a high enclosure. The equipment and wiring for the day it was built was modern. It was a "package" unit supplied by one of the large electrical equipment manufacturing compaines. By contract, Oregon Short Line was riembursed by Pacific Fruit for the cost of the new station and necessary wiring. The sub-station became the property of Pacific Fruit. It is clear that the ground on which the station stood was the subject of a leasehold to Pacific Fruit. Through the years, a majority of the electrical work done at Pocatello for Pacific Fruit was done by Union Pacific electricians. For this work, Pacific Fruit was bound to compensate and did compensate Union Pacific after it took over the railroad line from the Oregon Short Line.

The economic advantage of the whole arrangement to the companies was this: Either Union Pacific could get a cheaper rate than Pacific Fruit or there was a rate stucture which grew progressively lower with greater consumption which was achieved by combining the intake of the two over one line from the local utility, the Idaho Power Company. The arrangement was that the metered consumption of power by Pacific Fruit, plus a ten percent addition charged to loss on transmission and to overhead, would be deducted from Union Pacific's total reading for the electricity, thus getting Union Pacific's net consumption. Then the total bill would be pro-rated, Pacific Fruit each month reimbursing Union Pacific for the former's aliquot portion.

At the time of Johnson's injury, there seems to have been little change in the station from the time it was built. When he entered the enclosure to do his assigned painting, using one of the keys to the enclosure in the possession of Pacific Fruit supervisors, he had been informed by someone in authority in Pacific Fruit that the electricity had been cut off. To completely deaden the sub-station, four switches should have been pulled. Only one switch was disconnected. This was the switch carrying the current to the meter and thence out of the sub-station to the Pacific Fruit places of consumption. Three switches that left the wires which were a part of the lightning arrester mechanism still energized with electricity had not been pulled. With one of these wires, Johnson came in contact. For one trained in electrical apparatus, to take hold of the wire as Johnson did, would have been obvious negligence. Here the conditions under which the Pacific Fruit sent Johnson in to the place seems to have been dangerous. At least as to Pacific Fruit it could not be less than a question of fact on negligence, if theirs had been a common law liability.

Two contentions, we lay to one side immediately. Union Pacific claims it was not an electricity utility. And it says it never sold any electricity to Pacific Fruit: Pacific Fruit was just paying the Idaho Power Company for its own electricity. In the face of the billing to Union Pacific for the whole and the rebilling to Pacific Fruit by Union Pacific, we cannot see that there was anything but a sale of electricity from Union Pacific to Pacific Fruit Express.

On the other hand, Johnson argues that the electricity

which injured him in the sub-station had not yet passed through the meter of Pacific Fruit, thus it still belonged to Union Pacific and Union Pacific had a duty to take care of the electricity until it reached the meter. Of course, many cases turn on nice distinctions, which are unfortunately unavoidable. Here there is nothing in the contract clearly delineating at which spot in the wire electricity became the property of Pacific Fruit. Under such circumstances, we would think the presumption would be that the title to the electricity passed at the point where control and dominion of the electricity passed from one company to the other. Surely, this would be not later than the point where the incoming wires went into the sub-station enclosure.

One of Johnson's claims here is undoubtedly grounded on the proposition that Union Pacific maintained joint control of the sub-station. If so, Union Pacific is certainly in a dangerous position in the case. Johnson produced some testimony that certain Union Pacific men had been in and around the sub-station on the day in question doing certain work and also at some other times. Even though this was not work charged for by Union Pacific, as was usually done, at worst from Union Pacific's standpoint, the activity was subject to the inference that it was repair or maintenance work which should have been charged for as it is to the inference that it was work done intentionally for Union Pacific as a part of joint control. The fact that Pacific Fruit (not disputed) always kept the only keys to the enclosure is almost conclusive on the matter of control. While railroad employees discharging the ordinary duties of persons in their capacities

working for railroads may be presumed to be acting in the scope of their authority, we think no presumption can be drawn of joint control when they are casually found in a place where there is no showing they have a right or duty to be or if there within the scope of their authority, their presence is consistent with engaging in their employer's work as an independent repair contractor. When under the contract, Pacific Fruit was obligated to maintain the station, although it from time to time hired Union Pacific to do so, and occasionally someone else, we think to overcome the contract arrangement and establish joint control of the station someone of substantial authority with Union Pacific would have to be connected up with some joint control activity. Otherwise, the contract arrangement should govern.

No Idaho case is cited by either party which seems to us to conclusively answer the problems presented here. Of course, if there were such a case, this case wouldn't be here. Therefore, this court must proceed to reason the case along lines that it thinks would appeal to an Idaho court.

It is not to be gainsaid that the sub-station here is outmoded. It perhaps could not have been built under regulations in force at the time of Johnson's injury. Today modern techniques in building such stations would not leave any wires such as Johnson came in contact exposed where he could easily touch them. There are new methods for taking such wires away from the transformer. There are improved types of arresters which make such enclosures much less dangerous.

Union Pacific cannot be charged for defective original

construction, if it had been originally defective, because it did not build the station. The question is: Did it have a duty to stop sending its electricity into the sub-station, which had become outmoded and a hazard to the uninitiated who might be admitted without proper precautionary instructions.

Much is said here of negligence, proximate cause, intervening and superseding causes. We think it possible that there was at least a question of fact whether it was to be anticipated that Pacific Fruit would sooner or later let a man unfamiliar with electricity and safety measures into the enclosure without the switches all turned off.[1] Perhaps, it was foreseeable that sooner or later someone would get "mixed-up" with exposed and energized wires running around at points less than full body height.[2]

Plaintiff relies heavily on the appliance cases. Perhaps generally they may be summarized as holding that a supplier of gas or electricity has no duty to go on to the premises of his customer and look for defective appliances.[3] But if he knows of defective appliances, he has a duty to stop supplying his product or suffer with the owners of the appliances the

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[1]A serious question is posed as to whether plaintiff Johnson is not precluded here on causation under the decision of Chatterton, et al. v. Pocatello Post, 70 Ida. 480, 223 P 2d 389.

[2]In this connection, the cases of keys left by owners in automobiles with a resulting theft of the automobile and a negligent injury to an innocent bystander (while the car was driven by the thief) may not be inapposite. See Gower v. Lamb, ___ Mo. App. ___, 282 SW2d 867; Richards v. Spence, ___ Cal. 2d ___, 271 P. 2d 23.

[3]Minnesota Electric Light & Power Co. v. Hoover, 102 Okla. 270, 229 P. 285.

consequences for injuries to third parties.[1] And we assume that the rule is the same for equipment as for appliances. As we understand the appliance rule, the supplier with knowledge of the customer's appliances is held to be obliged to not furnish his product to appliances which *cannot* receive the product safely.

We think it one thing when a company turns its gas into lines which carry into a leaking stove known to it to be leaky or turns its electricity into new electric wires improperly installed and known to contain the possibility of fire at an early moment if the wires are energized. Usually the supplier has a duty there. Perhaps the duty also exists when a known hazard arises from the owner's failure to maintain or repair or restore equipment to its original condition.[2] Perhaps there the supplier has a duty to shut off his product. Beyond that, we do not think the cases go.[3]

But we are not convinced that when a customer has an appliance maintained in its original condition of repair and function, capable of use by the trained, capable of use with safety by the untrained if properly cautioned, that the supplier has any duty or right to cut off the supply of his product (which he is obligated by contract to supply) because the customer has not modernized his plant and has not put in the latest safety devices, has not rebuilt to a high safety standard.

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[1]Hoffman v. Leavenworth Light, Heat & Power Co., 91 Kan. 456 138 P. 632.

[2]Bristol Gas & Electric Co. v. Deckard, 6 Cir., 10 F. 2d 66. (There may be some question whether the Bristol case on its facts represents the weight of authority.)

[3]See Kelly v. Duke Power Co., (4 Cir.) 97 F. 2d 529.

We analogize to the case of a band saw. For some woodworking operation it is possible to install safety devices that make it very difficult to get one's fingers into the saw. But it was not always thus. Earlier band saws had little protection and it was quite foreseeable that a person around one of the earlier types was apt to get his fingers in it. We think there is no case that requires the vendor of electricity to require that his customer modernize his equipment to comply with improved safety developments when the equipment can be operated safely by the trained and safely by the untrained if properly cautioned.

If we make an exception for the tragic LaVerl Johnson, which we do not see how we can, we do not know where we could stop. Wouldn't it mean that every supplier of gas would have to be sure that every stove had the most modern safety devices? Wouldn't it mean that it would be a jury question against the supplier of electricity who sold it to one having an old fashioned electric heater into which a child easily gets his fingers—if it could be shown that modern heaters have better protection which keeps fingers out?

Union Pacific raised other points not necessary to consider in view of our conclusions here.

Upon the basis of our belief that there was not duty of Union Pacific to withhold electric current here, we hold the trial court should have granted plaintiff's motion for a directed verdict at the close of all the evidence. The case will therefore go back under a mandate to enter judgment for the defendant.

Probably the better school of "judging" holds to the view that one should forthrightly pronounce one's decision and say no more. However, this is a hard case. The result we reach brings us no pleasure or happiness. We wish we could see it otherwise.

But, as we look at it, Johnson is entitled to no more than his established claim on his Idaho workmen's compensation as against Pacific Fruit Express. We leave him where so many others in Idaho must be left—with only the claim arising out of his employment.

Judgment reversed.

(Endorsed:) Opinion. Filed May 11, 1956. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a Corporation, *Appellant,* vs. LAVERL JOHNSON AND JOLEEN JOHNSON, Husband and Wife, and PACIFIC FRUIT EXPRESS COMPANY, a Corporation, *Appellees.*	No. 14,498 May 11, 1956

JUDGMENT

Appeal from the United States District Court for the District of Idaho.

This cause came on to be heard from the United States District Court for the District of Idaho, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against Appellees Johnson.

IT IS FURTHER ORDERED and adjudged by this Court that the Appellant recover against the Appellees Johnson for its costs herein expended and have execution therefor.

(Endorsed) Judgment

Filed and entered: May 11, 1956
PAUL P. O'BRIEN, Clerk

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT EXCERPT FROM

Proceedings of Friday, August 3, 1956

Before: Stephens, Fee and Chambers, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the court, IT IS ORDERED that the petition of Appellees, filed July 9, 1956, and within time allowed therefor by rule of Court and valid extension thereof, for a rehearing of the above cause be and hereby is denied.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. ..... October Term, 1956

LAVERL JOHNSON AND JOLEEN JOHNSON, husband and wife, AND PACIFIC FRUIT EXPRESS COMPANY, *Petitioners,*

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation

UPON CONSIDERATION of the application of counsel for petitioner (s),

IT IS ORDERED that the time for filing petition for

writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November, 15, 1956.

/S/ WM. O. DOUGLAS
Associate Justice of the Supreme
Court of the United States

Dated this 5th
day of October, 1956

APPENDIX C

A Copy of Exhibit 16 of which Exhibit 20 is an enlargement.

FILED
DEC 3 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 573

LaVERL JOHNSON and JOLEEN JOHNSON,
husband and wife, and
PACIFIC FRUIT EXPRESS COMPANY,
Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 573

LaVERL JOHNSON and JOLEEN JOHNSON,
husband and wife, and
PACIFIC FRUIT EXPRESS COMPANY,

Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Statement of Facts set forth in the petition establish no duty on the part of the Railroad to the petitioner LaVerl Johnson, and establish no issue of negligence. However, in order that this court may have a complete picture of the evidence on which the Court of Appeals correctly based its opinion we set forth some additional facts.

Prior to March 1, 1924 the Pacific Fruit Express Company was receiving power direct from the Idaho Power Company. On March 1, 1924 the Oregon Short Line Railroad Company (not a party to this action) entered into a contract with the Pacific Fruit Express Company (Deft's Ex.

No. 26, R 314-315), which recites that the Idaho Power Company had agreed to furnish power to the Oregon Short Line Railroad Company at a different rate than that provided to the Pacific Fruit Express Company. The Court of Appeals gives the substance of this arrangement on page 429 of its opinion, 233 Fed. (2d), to the effect that the Railroad would buy all of the electricity and would then bill the Pacific Fruit Express Company for the proportion of the electrical energy used. The contract then provided for the building of a substation by the Oregon Short Line Railroad Company to be paid by the Pacific Fruit Express Company (R 315), and the Pacific Fruit Express agreed to pay the Oregon Short Line Railroad Company for power received plus 10% for transmission line and transformer losses (R 316). In other words, this was merely permitting the Pacific Fruit Express to take electrical energy supplied by the Idaho Power Company off the Oregon Short Line Railroad line. The Railroad was not actually delivering energy but had merely permitted the Express Company to hook a transmission line onto the Railroad line; the Railroad was not generating power (R 161, 354).

The Pacific Fruit Express Company transmission line from the Railroad line across the tracks and the substation was built by the Oregon Short Line Railroad Company, the cost of which was first estimated by the Express Company (Deft's Ex. 30, R 250), and about June 11, 1926 the actual cost was determined (Deft's Ex. 31, R 251), and the Oregon Short Line Railroad Company was paid by the Pacific Fruit Express Company for the construction of the trans-

mission line and the substation (R 252), following which the Express Company made out a completion report (Deft's Ex. 32, R 252), all of which exhibits definitely state that the ownership of the transmission line and the substation was in the Pacific Fruit Express Company.

The line and the station are carried in the capital or investment accounts of the Pacific Fruit Express Company, which shows ownership in that company (R 266); they are not carried in the capital or investment accounts of either the Oregon Short Line Railroad Company or the Union Pacific Railroad Company. This is so because the Express Company paid for them and it is the owner (R 273-274).

When the substation and transmission line were completed Mr. Branum of the Express Company accepted them for the Express Company (R 277), and Pacific Fruit Express Company ownership thereof was by the lessor Oregon Short Line Railroad Company acknowledged (Deft's Ex. 28, R 332); the Pacific Fruit Express Company is also the operator of the substation (Deft's Ex. 32, R 264, 294, 296).

Defendant's Exhibit No. 27 (R 322) is a lease from the Oregon Short Line Railroad Company to the Pacific Fruit Express Company dated April 29, 1926, and provides for the transformer and transmission line site; the transformer site and transmission line are shown in yellow on Ex. B attached to Exhibit 27, and are also shown on Ex. B attached to Exhibit No. 28 (R 326-333). Defendant's Exhibit No. 29 (R 336-338) merely enlarges the transformer

site from 15 x 22 to 33 x 31 feet, and continued the rental for the right to maintain and operate the transmission line across the tracks of the railroad to the substation.

The line across the tracks from the railroad line, described in the record as the Batiste line, to the substation only serves the substation and does not serve any railroad facilities (R 166, 282, 341, 345). There are disconnect switches on the pole of the Batiste line where the line to the Express Company substation takes off (R 283), and this is the point the power is delivered to the Express Company (R 342). At the top of the substation there is a pole top switch which deenergizes the three transformers in the substation (R 162, 163, 174, 302). In addition thereto there are switches at the substation to disconnect the power going to the lightning arrestors (R 163, 182, 203, 208-209, 239, 286, 345).

The substation is enclosed with a high wire fence (R 123, 166) covering an area of about 30 feet square (R 123-124, 284).

The substation is kept locked (R 167, 169, 284). There is only one gate in the transformer cage and that is in the west side. There are three transformers just inside the gate. The lightning arrestors are to the east of the transformers about 15 feet (R 141, 167-168).

The substation was standard when built and was what is termed a package substation, either of Westinghouse or

General Electric (R 236, 346). It was the latest thing in substations at the time it was built (R 236). This station on November 4, 1950, the date of the accident, and the equipment in it, was capable of receiving safely the electrical energy being supplied to it and to operate as a substation should. It was as safe as the day it was built. There was nothing defective about it or any of the equipment in it, but on the day in question it was not operated safely by the Express Company (R 182-183, 203-205, 236-237, 344-345). The witness Gilbert, District Foreman for the Idaho Power Company, accordingly testified that there was no reason to cut off service to the substation and that he would not have advised his employer, the Idaho Power Company, to refuse to furnish energy to the substation (R 238). The standards now are the same and if the station had been operated properly, the disconnect switches pulled, it would have been perfectly safe (R 239-241). It always operated satisfactorily as a substation; there were no injuries at it prior to November 4, 1950 (R 283).

LaVerl Johnson worked at the Pacific Fruit Express Company as a repairman (R 107); his immediate superiors were Shupe and H. O. Johnson. Shupe was plant manager and H. O. Johnson was Assistant Plant manager, both of whom worked for the Pacific Fruit Express Company and not for the Railroad; all were paid by the Pacific Fruit Express Company (R 224). H. O. Johnson died prior to the trial (R 123, 140).

Johnson went to work at the Express Company ice plant

at about 8 o'clock A. M. the morning of November 4, 1950. He was instructed by H. O. Johnson to paint electric cables that go into the transformer which was in a small transformer cage in the Ice Plant, and after that, or about noon, H. O. Johnson gave him the keys to the large transformer cage and instructed him to go into this cage and paint in there as he had painted in the other one (R 108, 110). There were only two keys to the substation gate and Mr. Shupe and his Assistant had possession of both; the Railroad had none (R 169, 293). McClellan saw LaVerl Johnson painting taped up wires running in and out of the transformers that morning in the small cage (R 140-141). LaVerl testified that when H. O. Johnson gave him the key to the large transformer there was no one else around (R 231).

After lunch, and after mixing the paint, LaVerl Johnson testified that he proceeded to the large transformer cage, unlocked the gate, walked around the transformer to work from the back side to the front and took hold of a wire that had not been deenergized (R 110), and this is when he received his injuries. His foot prints showed that after entering the gate he turned to the left, went around the north transformer, then switched back to the east to the lightning arrestors and then south to the south arrestor (R 141-142, 167-168). He testified that the transformers were right in front of the gate and was told to paint in this transformer cage like he had painted in the small one (R 228). In other words, he passed up the transformers where he was supposed to paint the leads and went back to the lightning arrestors, where he was injured.

He testified that he took no orders from the Railroad; that the Railroad did not tell him to paint the cables; that he took all orders from his supervisors at the Express Company, and that he went into the substation alone (R 231-232).

At about 9 A. M. November 4, 1950, Mr. James E. Johnson, Howard Johnson and Melvin Judge, all Pacific Fruit Express men (Judge was the Express Company electrician) went into the substation for the purpose of checking the oil in the transformers, and contrary to some inferences raised by petitioners witnesses, there were no Railroad electricians and no one from the Railroad at or around the substation (R 303-304, 308-309); there were some Pacific Fruit Express laborers that went in with them to cut weeds (R 303, 309), but the Johnsons and Judge were the last ones out and the gate was locked (R 304, 309). The laborers were warned that the arrestors were not deenergized and none of them got hurt (R 310, 313). Judge and the two Johnsons knew the arrestors were not deenergized (R 310). It was while these men were in the substation that morning that James E. Johnson pulled the pole top switch which disconnected the power to the transformer, but did not pull the disconnect switches to the arrestors.

There is no dispute about the fact that there were disconnect switches to deenergize the arrestors that could have been pulled by anyone working at the Pacific Fruit Express and particularly by the three men just referred to, one of whom was an electrician, and there was a hot stick available

to do this (R 286). If these disconnect switches had been pulled Johnson, of course, would not have been injured (R 170, 182-183, 203, 239, 286), and if this had been done the substation would have been perfectly safe (R 182, 237, 238). It was the method of operation of the substation by the Express Company that made the substation unsafe for LaVerl Johnson, and if the disconnect switches above the arrestors had been pulled there would have been no danger in the substation (R 183, 203, 209, 237, 239, 246).

The Pacific Fruit Express Company operates entirely independent of the Union Pacific; they are separate corporations, (R 235). The Pacific Fruit Express Company is a car line operator, and furnishes cars, refrigerator and heater service to various railroads, including the Union Pacific Railroad Company (R 359-361). The Pacific Fruit Express Company officers at Pocatello report to the Pacific Fruit Express officers in San Francisco, none of whom work for the Railroad, and no reports are made by the Pacific Fruit Express officers or employees to the Railroad (R 294-295, 360-361). The Pacific Fruit Express Company operates the substation (R 294), and no one from the Railroad has ever operated it, and no one from the Railroad has ever pulled the disconnect switches; Shupe and his Assistant has authority to pull them (R 295). Shupe did testify at the time of the accident he thought the pole-top switch deenergized all power in the substation, but he had been Plant Manager at the Plant only since September 1, 1949, (R 292); however, Mr. Branum, Superintendent, had been here in Pocatello and around the substation from the time it was first con-

structed: he knew about the switches (R 286); so did James E. Johnson, who pulled the pole-top switch the morning of the accident but did not pull the disconnect switches to the arrestors (R 304), and neither did Judge, who was the Express Company electrician (R 308, 310). Both of them knew what work was to be done (R 303, 308); even they did not anticipate apparently that later LaVerl Johnson was to be sent into this cage alone or that he would endeavor to paint a bare wire on the lightning arrestor after having been instructed to paint taped up leads to and from the transformers. There were no Union Pacific electricians at the substation since Shupe has been plant manager there (September, 1949) (R 292-293), and it is the Pacific Fruit Express Company men who change the transformer oil when it is needed (R 293-294, 346).

The Union Pacific electricians have no duties to perform in the substation (R 350) and no one from the Pacific Fruit Express, or otherwise, notified the Railroad electricians or anyone else on Saturday that Johnson was to go into the substation, and the lead electrician knew nothing of the accident until sometime the next day (R 343-344). The Union Pacific electricians work for the Union Pacific and not for the Express Company (R 341, 346); the only time they do work for the Express Company is when they are called by the Express Company to do so; they did some work in 1948 and 1949, which is shown on Defendant's Exhibit 33 (R 257-259), for which the Express Company paid the Railroad. The Union Pacific electricians have no keys to the substation and as a matter of fact did not work on Saturday.

November 4, 1950 (R 343).

The Idaho Power Company has also done work for the Express Company, as has the Strand Electric Company. The Express Company is not required to call the Union Pacific electricians (R 358-359), and the Express Company does lots of its own work (R 358). As a matter of fact the meter inside the substation was originally hooked up by the Idaho Power Company (R 284). The meter reader has to have someone from the Express Company, either Shupe or Johnson, let him in to read the meter, he has no key; Shupe had them both (R 114-115, 169, 293).

SUMMARY OF ARGUMENT

Point 1.

Petitioner's Cause of Action is that Railroad was Negligent (1) "in the furnishing of electrical energy" and (2) "in the operation of an electrical substation."

The Pacific Fruit Express Company was operating the substation—not the Railroad.

The Railroad was not selling electrical energy to the Pacific Fruit Express Company. Both companies were only co-users of energy supplied by the Idaho Power Company under an arrangement whereby the Express Company instead of purchasing power direct from the Idaho Power Company as it was doing prior to March 1, 1924, arranged to combine its load with that of the Oregon Short Line Railroad Company to obtain a cheaper rate, with the bill from the Power Company being made to the Railroad Company and the latter billing the Express Company for the portion it used, plus 10% for transmission line and transformer losses. To obtain the power the Express Company was permitted to tap a line onto the Railroad line which carried power from the Idaho Power Company, and this line went to the substation of the Express Company where LaVerl Johnson was injured. The power was received from the same source. The only change was to have the Railroad collect for the Power Company.

Point 2.

Under the plan referred to in Point 1, the Pacific Fruit Express Company's line from its substation extended across the railroad tracks where it tapped onto the Railroad's line carrying electrical energy from the Idaho Power Company. There was a switch on the pole where this line tapped the Railroad line, and this was the point the Express Company received its power. There was direct and undisputed evidence of this, plus the arrangement between the Railroad and the Express Company that to the bill from the Railroad to the Express Company for its proportion of the power it used would be added 10% for transmission line and transformer losses.

Points 1 and 2 are really immaterial to a decision of this case, in view of the law and the facts set forth and discussed in the succeeding points.

Point 3.

The Pacific Fruit Express Company had exclusive possession of the premises on which the substation is located by virtue of a lease from the Railroad. The Pacific Fruit Express Company accordingly was alone responsible for any injuries resulting from the operation of the substation which it owned, operated, controlled and maintained.

Point 4.

This point discusses further the question of liability and

establishes that the Railroad was not negligent. The substation and the line leading to it were owned, operated, controlled and maintained by the Pacific Fruit Express Company; the station was in good serviceable condition, and without defects. It had operated successfully and safely for 25 years before the accident to Johnson, and its facilities were in proper condition to receive current safely. No reason existed to cut off service to it (R 238).

Upon completion of the construction of the substation many years ago it was accepted by a representative of the Express Company, after which time the responsibility for any failure to make it safe belonged entirely to the Express Company.

Many supporting authorities are cited.

Point 5.

The accident to Johnson was not reasonably foreseeable.

The substation was in good condition as previously related; it was entirely adequate to receive energy safely. It had done so for 25 years without any accidents or injuries. The station was kept locked, with only two keys available, both in possession of officers of the Express Company. There were switches in the substation to deenergize transformers and arrestors. The day Johnson was injured the Railroad knew nothing about what the Express Company proposed to do. It had no knowledge or information that Johnson

was to be sent into the station to paint, or that his supervisors would send him in alone without warning or without deenergizing not only the transformers but the arrestors.

The Railroad had the right to presume the agents of the Express Company would perform their duty and could not reasonably foresee negligent conduct of the Express Company's officers and agents, neither could it reasonably foresee that Johnson would attempt to paint a bare wire leading to the arrestors when he was told to paint cables or taped wires leading to and from the transformers.

Point 6.

If the Pacific Fruit Express Company officers had performed their duty as mentioned in Point 5 this accident would not have occurred. The way in which the station was operated constitutes the sole proximate cause.

Point 7.

If the Railroad owed a duty to anyone, it was solely to the Pacific Fruit Express, and not to Johnson, to let power go over the Express Company's line to its substation, a substation entirely adequate and safe to receive the power. Therefore, the fact that electrical energy was going into the station merely furnished a condition, and not the proximate cause. See points 5 and 6.

Point 8.

This Point is a general discussion of the petition.

It was not the responsibility of the Railroad to make any changes in the substation, if any were needed, or to cut off power to it. It was a good and substantial station without defects, and entirely safe to receive electrical energy, which it had been receiving successfully for 25 years.

It was immaterial, in any event, whether the arrestors were barricaded or put up higher in the station for if LaVerl Johnson thought he was to paint all the bare wires he would have made some arrangement to reach them.

The fact that the signs at the substation did not indicate the function of any switch is beside the point because Johnson testified he did not look for signs.

The National Electric Code by its terms and the Idaho statute with reference thereto, only governed new installations, and in any event, had no application in this case to the Railroad.

Every substation is dangerous if not operated properly. If it had been operated properly as it had been for 25 years there would have been no accident. It was safe if properly operated. The Railroad was not, in any event, an insurer, but that is what petitioners are in effect claiming. If the Railroad is to be held liable in this case, then every automobile manufacturer, or every manufacturer of firearms, would be

responsible for every accident occurring on the theory that they must anticipate that such dangerous instrumentalities, would, at sometime or other, be operated unsafely. The law is entirely otherwise.

The Pacific Fruit Express Company had its own electrician at the substation four or five hours before this accident occurred and at which time the switch was pulled to deenergize the transformers, but the arrestor switches were not pulled even though Express Company laborers were in the cage cutting weeds.—They were warned, and were not injured. LaVerl Johnson was not warned, or he was erroneously warned that the power had been turned off.

Again, if the Express Company officers, before sending Johnson in to paint had disengaged the switches to the arrestors the station would have been perfectly safe for Johnson or anyone else.

The decision of the Court of Appeals is amply supported by the Idaho cases and all others. The Court of Appeals decided the case the only way the law would permit.

Independent Contractor

For the first time petitioners assert the Express Company was an independent contractor and the Railroad should have exercised some care in the selection of the contractor. The Express Company and its employees had performed satisfactorily for 25 years.

Petitioners bring this question up contrary to the Court's

instructions to which they did not except, but in any event, to raise this question brings the case squarely within the provisions of the Idaho statutes and the Idaho decisions thereunder, and makes the Railroad a statutory employer under the Workmen's Compensation Act, and hence the Railroad is not subject to a common law action for negligence. This is another complete defense to this action.

Point 9.

Petitioners evidence does not even present a scintilla. The causes of the accident were so remote they could not be anticipated. The verdict in favor of petitioners was wholly unsupported.

ARGUMENT

Point 1

The Railroad was not selling or delivering electrical energy to the Pacific Fruit Express Company.

The basis of petitioners cause of action is that the Railroad was negligent "in the furnishing of electrical energy *and* in the operation of an electrical substation" (emphasis supplied) (R 3-4).

That the Railroad was not operating the substation is clear (Deft's Exhibits 30, 31, 32 R 262-265, 250-253, 266, 273-274, 294-296, 332-333). When completed the station was accepted for the Pacific Fruit Express Company by Mr. Branum, its representative (R 277). We think it equally clear that the Railroad was not selling or delivering electrical energy to the Pacific Fruit Express Company. The Court of Appeals held that there was a sale of electricity by the Railroad to the Pacific Fruit Express Company, but we think the facts clearly support a contrary holding, for the following reasons:—

The Pacific Fruit Express prior to March 1, 1924, was obtaining its power directly from the Idaho Power Company, but as of that date by combining its needed power with that of the Railroad a cheaper rate could be obtained, so by tapping a line onto the railroad line and constructing a substation it continued to get its electrical energy from the Idaho Power Company, but the energy it used was billed to

the Railroad and the cost thereof paid to the Railroad instead of to the Idaho Power Company (Deft's Ex. 26 R 314-316); the only change that was made actually was the billing. The Railroad was not selling power, it was merely acting as a collection agency for the Idaho Power Company and for the benefit of the Pacific Fruit Express, and no one else. The power still came from the Idaho Power Company (R 144). Further evidence of this is Plaintiff's Exhibit 21 (R 210-211), which is a bill from the Railroad to the Pacific Fruit Express Company, which in part reads as follows:

> "For your proportion for cost of Electric Current furnished at Pocatello, Idaho, in accordance with meter reading for the month: October 22 to November 22 incl. Such current being furnished by the Idaho Power Co., is being billed for in accordance with contract Audit No. 16598 dated June 10, 1930."

Carrying the evidence further, which is consistent with petitioners' proof, was the statement of Mr. Gilbert, the District Foreman of the Idaho Power Company, when asked if he would have advised his Company not to furnish power to the substation he said:

> "A. No, we would not advise them not to deliver energy because the service was always delivered to it,—at that time the substation had not been changed; it was safe at the time we started service and there was no reason why service should have been cut off" (R 238).

The power could come from no other source; the Railroad did not generate it; the Railroad merely permitted a tap onto its line so the Pacific Fruit Express Company could get the same power it had always received from the Idaho Power Company; the Railroad and the Pacific Fruit Express was merely operating on a co-user plan. If the Idaho Power failed neither the Railroad nor the Pacific Fruit Express received any.

Point 2

Power was delivered to Pacific Fruit Express Company where its line tapped onto the railroad line.

The Court of Appeals quite fairly decided this question when it said the electricity passed to the Pacific Fruit Express "not later than the point where the incoming wires went into the substation enclosure". Petitioners in discussing this situation on pages 34 to 36 of their Petition and Brief overlooked the facts. The contract. (Defendants Ex. 26 R 314) states that the Express Company agreed "* * * at its own expense to install and maintain all equipment necessary for the application of said power beyond the point of delivery", and the undisputed evidence in the record is that the electrical energy was delivered to the Express Company at the pole on the Batise or railroad line (R 342) to which the Express Company's line is attached and which carries the current over this line (its own) across the tracks to the substation which it also owns, operates and controls, as we have previously shown. There being direct evidence of the place of delivery

the discussion as to this question should end. The contract, however, in addition to the testimony just referred to, not only sustains the statement of the Court of Appeals but places the point of delivery beyond the substation and at the pole on the railroad line as the witness testified. If delivery was to have been on the secondary side of the transformer where the meter was instead of where it was actually made at the pole on the railroad line, then there would have been no provision for a 10% *transmission line and transformer loss* (R 316). This clearly indicates that the Railroad in effect said to the Pacific Fruit Express "you take this power where your line taps onto ours but you pay 10% for loss over your line and through your substation to the meter on the secondary side". The fact that the meter is on the secondary side rather than some place else is insignificant, for petitioners witness Gilbert stated they are put on either side whichever might be considered better (R 167). There was no other place to put the meter except on some high pole such as the one where the Express Company line taps onto the railroad line, which would have been an impractical location.

The fact that the transformers were to accommodate delivery of approximately 2300 volts has nothing to do with the point of delivery, that merely refers to the capacity of the transformer or the amount of volts the Express Company needed in its business.

This question, we think, becomes immaterial in any event in view of the authorities we refer to under the succeeding points.

Point 3

The Railroad as lessor was not liable.

The Pacific Fruit Express under the lease (Deft's Exhibits 27 and 29, R 322-333, 336-339) had exclusive possession and control of the premises on which the substation was located and the Railroad "owed no duty to supervise his (its) tenant's business to the end that it not be conducted in such a way as to be dangerous", and any liability resulting from the operation of the substation would be that of the lessee Pacific Fruit Express Company.

Olin vs. Honstead, 60 Ida. 211, 91 Pac. (2d) 380, 383, 384;

City of Lewiston vs. Isaman, 19 Ida. 653, 115 Pac. 494;

Goodman vs. Harris, (Cal.) 253 Pac. (2d) 447.

Point 4

The Railroad was not negligent and the opinion of Court of Appeals in that respect was correct.

Petitioners have never cited any cases, and cite no cases herein, and we are certain none can be found, that will establish under the facts of this case any negligence on the part of the Railroad. The authorities are all to the contrary, as we shall establish. Petitioners never proved, and

they could not prove, that the Railroad owed any duty to LaVerl Johnson.

Chatterton vs. Pocatello Post, 70 Ida. 480, 223 Pac. (2d) 389, 20 A. L. R. (2d) 783;

Northern R. Co., vs. Page, 274 U. S. 65;

Palsgraf vs. Long Island R. Co., 248 N. Y. 330, 162 N. E. 99, 59 A. L. R. 1253.

Assuming, for the sake of argument only, that the Railroad was furnishing the energy, it nevertheless was not negligent, for where, as here, the substation and transmission line are owned, operated, controlled and maintained by the Pacific Fruit Express Company the Railroad is not responsible for injuries to persons on such premises.

The subject is annotated in *134 A. L. R.*, with propositions of law stated at pages 508, 511, 515, 517, 518 and 526. The rule stated in the authorities is that where power is merely furnished to a responsible party who owns and controls the poles, wires and appliances which are in proper condition to receive the current safely that the furnishing party is not required at his peril to see that such equipment is kept safe.

Kelly vs. Duke Power Company (4 Cir.) 97 Fed. (2d) 529;

Benard vs. Vorlander (Cal. DCA)
197 Pac. (2d) 42, 45;

City of Cushing vs. Presbury (Okla. 1941),
109 Pac. (2d) 1077;

Hill vs. Pacific Gas & Elec. Co., (Cal.)
136 Pac. 492;

Mullican vs. Meridian Light & R. Co.,
(Miss.) 83 So. 816, 9 A. L. R. 165;

Perry vs. Ohio Valley Elec. R. Co.,
(W. Va.) 74 S. E. 993;

Roberts vs. Pac. Gas & El. Co.,
(Cal. DCA) 283 Pac. 353;

Irelan-Yuba Gold Quartz M. Co., vs. Pacific Gas & Elec. Co., (DCA Cal.) 105 Pac. (2d) 616;

Hoffman vs. Leavenworth Light, H & P. Co.,
(Kan.) 138 Pac. 632, 50 L. R. A. (NS) 574;

Minneapolis General Electric Co. vs. Cronon,
166 Fed. 651, 20 LRA (NS) 816;

Pressley vs. Bloomington-Normal Ry & Light Co.,
(Ill.) 111 N. E. 511;

Memphis Consol. Gas & Elec. Co., vs. Speers,
(Tenn.) 81 S. W. 595;

Burns vs. Carolina Power & Light Co.,
(4 Cir.) 193 Fed. (2d) 525.

We have found no cases which hold a defendant, such as the Railroad Company in this case, liable where it merely permits another to tap a line onto its line and take power from the same source the Railroad receives its power.

In the case at Bar, the evidence is undisputed that there were no defects in any of the equipment, or in the line or in the substation. It was capable of performing its functions safely as it had been doing for 25 years (R 182-183, 203-205, 236-237, 344-345), and there was no reason whatever to cut off the service to it (R 238).

After Mr. Branum on behalf of the Pacific Fruit Express Company accepted the substation and transmission line when completed (R 277) it was the responsibility of the Express Company to maintain and operate it and if as a result of its operation some one is injured it alone would be responsible.

Goar vs. Village of Stephen (Minn.)
196 N. W. 171;

Bogoratt vs. Pratt & Whitney Aircraft Co.,
(Conn.) 157 A. 860;

Howard vs. Reinhart & Donovan Co.,
(Okla.) 166 Pac. (2d) 101.

In the *Bogoratt* case the court said:

"When he accepts work that is in a dangerous condition the immediate duty devolves upon him to make it safe; and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury."

Point 5

The extra-ordinary acts and conduct of the officers and agents of the Pacific Fruit Express Company and of LaVerl Johnson were not reasonably foreseeable by the Railroad Company.

The substation was standard when built, and is as capable and safe now of receiving energy as it was at the time it was built (R 236-238, 345-346); there is nothing defective about it or any of the equipment in it (R 236-238, 345); there has never been an injury from the time it was built in 1925 until LaVerl Johnson received an injury in 1950 (R 283); the Pacific Fruit Express had the only keys to the substation, which was always kept locked, and the Railroad had no keys (R 115, 169, 293); there were switches in the substation, not only to deenergize the transformers, but also the lightning arrestors (R 162, 175, 182-183, 239, 286, 304, 345); and if the substation on the day in question had been operated properly by the Pacific Fruit Express Company the injuries to LaVerl Johnson would not have occurred (R 183, 203-204, 209, 237-239, 246, 345).

Irrespective of any other facts petitioners have presented

there is absolutely nothing in the record to establish that the Railroad Company knew or had reason to believe that La-Verl Johnson was to go into the substation on Saturday afternoon November 4, 1950, or at any other time. It could not reasonably anticipate that he or anyone else would be given the keys to enter this substation unaccompanied (that had never occurred before). It had no reason to believe that if he or anyone else was sent in to the substation that he or they would not be warned of the dangers; that he would not be warned that the switches leading to the lightning arrestors had not been pulled, or that these lightning arrestor switches would not be pulled if Johnson had any work in or about the arrestors. Neither could the Railroad anticipate that Johnson, having been instructed to paint cables or wires leading to and from the transformer in the large transformer cage the same as he did in the smaller transformer cage, would ignore such instructions and proceed to a point 12 to 15 feet behind the transformer and take hold of a bare wire leading to the arrestor.

A defendant is not responsible for a consequence which is merely possible according to occasional experience, but only for those consequences which are probable according to ordinary and usual experience.

Probart vs. Idaho Power Company, 74 Ida. 119, 258 Pac. (2d) 361;

Antler vs. Cox, 27 Ida. 517, 149 Pac. 731;

Atchison T & S.F. Ry. Co., vs. Calhoun, 213 U.S. 1, 53 L. Ed. 671;

Charnock vs. Texas & P.R. Co., 194 U.S. 432, 48 L. Ed. 1057;

The President Madison (9 Cir.) 91 Fed. (2d) 835, 841;

Cole vs. German Sav. & L. Soc., 124 Fed. 113, 63 L.R.A. 416;

Garrison vs. St. Louis & S.F. Ry. Co., (Kan.) 271 Pac. (2d) 307, 311;

Hair vs. City of Lynchburg (Va.) 181 S.E. 285, 287;

Palsgraf vs. Long Island R. Co., 248 N.Y. 330, 162 N.E. 99, 59 A.L.R. 1253; (Decision by Justice Cardozo)

Every person has the right to presume that every other person will perform his duty and in the absence of reasonable ground to think otherwise it is not negligence to assume that one is not exposed to dangers which come to him only from violation of law or duty by such other person.

Leo vs. Dunham (Cal.) 264 Pac. (2d) 1, 3;

Richards vs. Stanley (Cal.) 271 Pac. (2d) 23, 27.

Point 6

The manner and method of the operation of the substation by the Pacific Fruit Express Company prior to and at the time LaVerl Johnson was sent into the substation to work by the officers and agents of the Pacific Fruit Express Company constituted the proximate cause.

Splinter vs. City of Nampa, 74 Ida. 1, 256 Pac. (2d) 215;

Chatterton vs. Pocatello Post, 70 Ida. 480, 223 Pac. (2d) 389, 20 A.L.R. (2d) 783;

Antler vs. Cox, 27 Ida. 517, 149 Pac. 731;

Clark vs. Chrisop, 72 Ida. 340, 241 Pac. (2d) 171;

Atchison, T & S. F. Ry., Co. vs. Calhoun, 213 U.S. 1, 53 L. Ed. 671;

Pittsburg SS Company vs. Palo (6 Cir.) 64 Fed. (2d) 198, 200, 201;

Cole vs. German Sav. & L. Society, 124 Fed. 113, 63 L.R.A. 416;

United States vs. Rothschild International Steve. Co., (9th Cir.) 183 Fed. (2d) 181;

Hair vs. City of Lynchburg (Va.) 181 S.E. 285, 287;

Stackpole vs. Pacific Gas & Electric Co., (Cal.) 186 Pac. 354;

Georgia Power Company vs. Kinard, (Ga.) 170 S.E. 688, 691;

Leavitt vs. Stamp (Ore.) 293 Pac. 414;

Woodruff vs. Bowen (Ind.) 34 N.E. 1113;

Harter vs. Colfax Electric Light & Power Co., (Iowa) 100 N.W. 508;

Johnson vs. Union Furniture Company, (Cal. DCA) 87 Pac. (2d) 917.

Point 7

The transmission of energy to the substation irrespective of how it got there or who was responsible for getting it there merely furnished a condition which would not constitute the proximate cause.

Chatterton vs. Pocatello Post, 70 Ida. 480, 223 Pac. (2d) 389, 20 A.L.R. (2d) 783;

Splinter vs. City of Nampa, 74 Ida. 1, 256 Pac. (2d) 215;

Antler vs. Cox, 27 Ida. 517, 149 Pac. 731;

Rowe vs. Northern Pacific Ry., 52 Ida. 649, 17 Pac. (2d) 352;

Cole vs. German Sav. & L. Society, 124 Fed. 113, 63 L.R.A. 416;

Hauser vs. Pacific Gas & Electric Co., (Cal. App.) 23 Pac. (2d) 1068;

Leavitt vs. Stamp, (Ore) 293 Pac. 414;

Seith vs. Commonwealth Electric Company, (Ill.) 89 N.E. 425.

Point 8

Discussion of the Petition in general.

It was not the responsibility of the Railroad to make any changes in the substation if any were needed, or to cut off power going into the station, for it was a good substantial substation without defects, and, as the evidence shows without dispute, was entirely safe and capable of receiving the energy as it had done for 25 years and without accidents.

Whether the lightning arrestors should have been barricaded or put up higher in the substation out of reach certainly imposed no liability on the Railroad. As a matter of fact, if the arrestors had been barricaded or placed higher

up in the substation when Johnson went into it he would have gotten to the same wire of the arrestor in some manner because he thought he was to paint all the bare wires. If he thought he was following instructions he would have gone over any barrier or would have used a ladder to reach the wires if they had been placed higher and out of reach.

The fact that the pole-top switch in the substation or other signs thereat failed to mention that the pole-top switch only disconnected the power to the transformer is clearly immaterial for LaVerl Johnson testified he looked for nothing of the sort when he went in (R 228).

Section 54-1001 *Idaho Code*, adopting the National Electric Code, was first passed and approved in 1947. It says that installations "from and after the taking effect of this Act", etc., shall be in substantial accord with the National Electric Code. The substation was built in 1925.

If the Code was applicable to the substation after 1947, (and we think it was not for Rule 91 B of the Code stated that the intent of the rules will be realized "by applying the rules in full to new installations, reconstructions, and extensions,") then it had application only to the Pacific Fruit Express Company in the situation at hand and not to the Railroad.

The remarkable thing about all of petitioners testimony concerning the substation is that neither the State Inspector Rising, or Gilbert, testified they had ever told the Express

Company to do anything .bout the substation either before or after the accident. The testimony of Rising and Smith particularly was hindsight.

Every substation is dangerous no matter how it is constructed. That is the reason they are fenced and kept locked. If petitioners theory in this case is correct then every person or firm supplying power is an insurer and no company generating and supplying electricity would ever be without liability. The cases, however, as we have shown, are all to the contrary and state the law to be that there is no liability on the part of one delivering power to equipment owned, operated, maintained and controlled by others.

This substation, we think, is comparable to an automobile, or any other agency, dangerous or otherwise. If properly operated it is safe. If petitioners theory is correct then the manufacturer or dealer of automobiles, or manufacturer of firearms, could be held liable on the theory that they had placed in the hands of people a dangerous instrumentality and should anticipate that someone would operate them in an unsafe way or use them unsafely. Such a theory is so far-fetched that no one, we think, would consider it for a minute.

The fact that the substation might be dangerous is not enough: all of them are if not operated properly. If the switch on the line which supplies energy to the transformers had not been pulled and Johnson had been injured there the substation would have been dangerous. It was dangerous

when Johnson went in on the day of his injury because the disconnect switches to the arrestors had not been pulled and his boss told him the power was off, when it wasn't. Johnson went in to paint leads or cables to and from the transformers; the power to them was off, and Johnson's supervisor, undoubtedly relying on what he had told him to do, failed to tell him the power to the arrestors had not been cut off. Such warning had been given to the laborers cutting weeds in the station that morning. Nevertheless the disconnect switches on the arrestors had not been pulled and petitioners own witnesses testified if these had been pulled to cut off the power to the arrestors then the substation would have been perfectly safe for Johnson (R 182-183, 203, 237, 239).

The substation was a safe place to work if it had been properly supervised and operated. The accident was not caused by any breach of duty or negligence on the part of the Railroad but the dangerous situation was created entirely by the Pacific Fruit Express Company without any knowledge on the part of the Railroad. *Austin vs. Riverside Portland Cement Company* (DCA Cal.) 271 Pac. (2d) 943, 948.

Petitioners have consistently refused to recognize the fact that the Pacific Fruit Express Company had a qualified electrician at the substation the morning of the accident. Melvin Judge was its electrician (R 307). He and the two other Johnsons were in the substation this particular morning changing or inspecting transformer oil and there was no one there from the Railroad (R 303-304, 308-309). Pacific Fruit Express Company laborers were inside the cage at that

time cutting weeds (R 303,309). These laborers were warned that the arrestors had not been deenergized and none of them were hurt (R 310, 313); the Johnsons and Judge were the last out and locked the gate (R 304, 309). These men knew the arrestors had not been deenergized, they, if anyone, knew what the Pacific Fruit Express was proposing to do that day, and the Railroad did not know, yet one of the Johnsons, LaVerl's supervisor, gave him the key and sent him in alone with instructions to paint transformer cables without making the substation safe by pulling the switches or warning LaVerl they were not pulled. It was a simple matter for either Howard Johnson, J. E. Johnson, or Melvin Judge to have disconnected the switches to the arrestors and if that had been done the station would have been as safe as one's own home, perhaps safer. This is not, and cannot be, disputed.

Petitioners' witness Smith testified over defendant's objection as to what the law was, and to the effect that where the substation was hazardous the current should be turned off. Of course, this testimony was inadmissible for two reasons,—first, it was the duty of the court to instruct as to the law, and secondly, the law, as we have demonstrated, is otherwise. It was unnecessary for the Court of Appeals to decide this, as well as other errors, because the facts and the law make it clear that the railroad could not be held liable.

We do not agree with the statement of Petitioners on pages 15 and 16 of the petition that the trial court's instructions were correct. They were not correct, but, as we

understand the situation, this proceeding involves only a determination of whether this Court should review the action of the Court of Appeals, which was correct in holding that the Railroad was not liable.

We think the opinion of the Court of Appeals was in effect based on the Idaho law, or on law concerning which there is no dispute. The Idaho cases referred to herein fully support the opinion of the Court of Appeals. Certainly the Idaho Supreme Court would be expected to follow the rule of law, announced by the cases from other jurisdictions, upon which there is no dissent, namely; that it is not negligence for a supplier of electricity to furnish energy to a responsible party who owns, operates, controls, and maintains the poles, wires and appliances which are in proper condition to receive current. The Idaho decisions establish that negligent operation of an installation, such as was done by the Pacific Fruit Express Company, constituted the active independent, intervening cause, and hence the proximate cause of any resulting injury. *Splinter vs. City of Nampa*, 74 Ida. 1, 256 Pac. (2d) 215; *Chatterton vs. Pocatello Post*, 70 Ida. 480, 223 Pac. (2d) 389; 20 ALR (2d) 783; *Antler vs. Cox* 27 Ida. 517, 149 Pac. 731.

Petitioners have never cited or referred to any decisions, either from Idaho or elsewhere, which sustain their contention that the Railroad was liable in this case. The Chase case has no application, for there the defendant constructed, owned, operated and maintained the equipment involved; actually we think the case has ceased to be authority since the decision

of the Idaho Supreme Court in the case of *Probart vs. Idaho Power Company*, 74 Ida. 119, 258 Pac. (2d) 361.

The Younie case has no application for the same reason the Chase case is inapplicable. The negligence in the Younie case related to the erection, operation and maintenance of defendant's plant. It might possibly have some application in a suit against the Pacific Fruit Express, but not against the Railroad.

No Idaho case referred to by petitioners even comes close to forecasting a decision in their favor.

Independent Contractor

Now for the first time petitioners refer to liability of one employing an independent contractor. They say that where one engages a contractor to carry out an undertaking involving hazard he must exercise some care in the selection as to fitness and ability. Assuming that statement to be true, there is no evidence that the Railroad was guilty of any negligence in contracting with the Pacific Fruit Express Company to perform its work. This substation had been operated by the Pacific Fruit Express Company without neglect for 25 years. The Railroad certainly had the right to assume that such good conduct would continue.

Petitioners took no exceptions to the instructions of the Court that "as to the Pacific Fruit Express, none of their acts are to be charged against the Union Pacific" (R 386). This instruction was correct. *Perry vs. Ohio Valley Elec. R. Co.*,

(W. Va.) 74 S.E. 993; 14 C.J. 58, Sec. 19; 14 C.J. 873, Sec. 1332.

In connection with this feature, petitioners say that the Pacific Fruit Express furnishes cars and protective services, including refrigeration or heater services, for the Union Pacific, (R 314, 359-360); the substation and line leading to it was to be used in the performance of that work. The testimony referred to is correct, and puts this case directly within the provisions of Sections 72-1010 and 72-811 Idaho Code, which are quoted in full in the Appendix.

These Sections and the decisions thereunder make the Railroad a statutory employer and accordingly not subject to a common law action based on negligence, which the case at Bar is.

Fisk vs. Bonner Tie Company, 40 Ida. 304, 232 Pac. 569;

Gifford vs. Nottingham, 68 Ida. 330, 193 Pac. (2d) 831;

Modlin vs. Twin Falls Canal Co., 49 Ida. 199, 286 Pac. 612;

Hiebert vs. Howell, 59 Ida. 591, 85 Pac. (2d) 699;

Brown vs. Arrington Const. Co., 74 Ida. 338, 262 Pac. (2d) 789.

This is another complete defense to this action.

Trial Court vs. Court of Appeals

There is nothing in this case which would prevent the judges of the Court of Appeals from correctly interpreting any of the Idaho cases, or of any of the other cases. The cases establish the law and not the length of time a person has practiced in Idaho. In any event, petitioners had or have no cases from Idaho, or elsewhere, to establish liability on the part of the Railroad.

While not pertinent herein, petitioners state respondent's attorneys neither moved for a new trial or urged as error on appeal any instructions remotely resembling the delineation of a seller's duty enunciated by the Circuit Court. We have always contended that the Railroad was not a seller of electrical energy, and still so contend, and we think counsel for petitioners, in making the statement they did are incorrect (R 390 par. VI R 25).

Point 9

Petitioners evidence was wholly insufficient to support a verdict in their favor.

The weight of the evidence must be more than a scintilla before the case may be properly left to the discretion of the triers of fact and bare possibility is not sufficient. Events too remote to require reasonable prevision need not be anticipated. *Hoffer vs. City of Lewiston* 59 Ida. 538, 85 Pac.

(2d) 238; *Brady vs. Southern R. Co.*, 320 U.S. 476.

The case for petitioners is left without any substantial support in the evidence and a verdict in their favor could only rest upon mere speculation and conjecture, which cannot supply the place of proof. *Pennsylvania R. Co. vs. Chamberlain*, 288 U.S. 333, 77 L. Ed. 819; *Moore vs. Chesapeake & O. Ry. Co.*, 184 Fed. (2d) 176, 179; affirmed in 340 U. S. 573, 95 L. Ed. 547, 550-551; *Hawley vs. Alaska Steamship Company* (9th Cir.) 236 Fed. (2d) 307.

There are no adequate reasons for the granting of a Writ of Certiorari.

The opinoin of the Court of Appeals, and the showing made herein, definitely establish no liability on the part of the Railroad Company, hence no violation of the Seventh Amendmnt or of any other part of the Constitution. This case involves no federal statutes and in fact no federal question of any sort, and hence no "important" question of federal law which should be settled by this Court. Neither has the Court of Appeals departed from any accepted and usual course of judicial proceedings which calls for any exercise of this Court's power of supervision. The Court of Appeals has done only what this Court has done on many occasions when the facts show no liability on the part of the defendant. Some of these cases are,—

Pennsylvania R. Co., vs. Chamberlain,
288 U. S. 333, 77 L. Ed. 819;

Brady vs. Southern R. Co., 320 U.S. 476, 88 L. Ed. 239;

Eckenrode vs. Pennsylvania R. Co., 335 U.S. 329, 93 L. Ed. 41;

Moore vs. Chesapeake & Ohio Ry. Co., 340 U.S. 573, 95 L. Ed. 547.

The rule in Idaho is the same.

Chatterton vs. Pocatello Post, 70 Ida. 480, 223 Pac. (2d) 389, 20 ALR (2d) 783;

Probart vs. Idaho Power Company, 74 Ida. 119, 258 Pac. (2d) 361.

The case at Bar is a diversity case involving only the question of general common law negligence. There is no question of such gravity and general importance as to require the review of the conclusions of the court of appeals. *Ex Parte Woods*, 143 U. S. 202, 36 L. Ed. 125.

Rule 19 of this Court requires "special and important reasons" for granting the writ of certiorari, and "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties * * *" and the Court does not review decisions of the Court of Appeals which turn solely on the evaluation of testimony. *National Labor Relations Board vs. Pittsburgh Steamship Company*, 340 U. S. 498, 503, 95 L. Ed. 479, 483; *Rice vs. Sioux City Cemetery*, 349 U. S. 70,

99 L. Ed. 897.

Petitioners here seek nothing more and nothing less than the reappraisal of the evidence of an isolated case which three competent and experienced Judges of the Court of Appeals after full and mature consideration unanimously and correctly agreed as a matter of law that the evidence did not establish negligence on the part of the Railroad Company.

CONCLUSION

We respectfully submit that the Court of Appeals did no err in its analysis of the evidence in this case and that th Court correctly decided that there was no evidentiary basi for a finding of negligence on the part of Respondent an that the Petition for Writ of Certiorari be denied.

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APPENDIX

IDAHO CODE

72-811. CONTRACTORS AND SUBCONTRACTORS.—An employer subject to the provisions of this act, shall be liable for compensation to an employee of a contractor or subcontractor under him or who has not compiled with the provisions of section 72-801 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer. The contractor or subcontractor shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party. The employer who shall become liable for and pay such compensation may recover the same from the contractor or subcontractor for whom the employee was working at the time of the accident. This section shall be in force as to all contracts made subsequent to March 15, 1921. (C. S. Sec. 6287A as added by 1921, ch. 217, Sec. 19, p. 474; I. C. A., Sec. 43-1611.)

72-1010. EMPLOYERS.—"Employer," unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed. If the employer is secured it includes his surety so

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 573

LAVERL JOHNSON and JOLEEN JOHNSON, husband and wife, and PACIFIC FRUIT EXPRESS COMPANY, *Petitioners,*

v.

UNION PACIFIC RAILROAD COMPANY, a corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

The respondent's brief in opposition does not meet the petition. In the main it merely urges contentions made in the court below and either there expressly rejected or not passed upon.

BASIC POINTS OF THE PETITION ARE NOT CONTROVERTED BY RESPONDENT

Only in Points 8 and 9 (Resp. Br., pp. 31-40) does respondent purport to touch on the reasons for granting the writ urged in the petition. Even there, respondent is significantly silent on two important points:

1. Respondent does not attempt to negative petitioners' assertion that the court of appeals in deciding the question of law presented by the denial of motions for directed verdict and for judgment notwithstanding the verdict, ignored the clear rule of this Court that the reviewing court must assume as established all facts in support of plaintiff's claim that the evidence reasonably tends to prove .

2. Respondent does not attempt to reconcile the court of appeals holding that the evidence showed that the substation could be operated safely by the trained and safely by the untrained if properly cautioned and that the customer had merely failed to put in the latest safety devices, with petitioners' record evidence that the design and construction of the substation was unreasonably dangerous, both to the trained and the untrained.

These were the basic errors pointed out by the petition for writ of certiorari.

But after reading respondent's brief one might well ask: "In whose favor was the verdict in the trial court?" For respondent's argument would be valid only if the verdict were for the defendant. Respondent seeks here to perpetuate the errors into which it led the court below by its reiterated reliance on the assertion that—

> "The substation was standard when built, and is as capable and safe now of receiving energy as it was at the time it was built (R. 236-238, 345-346); there is nothing defective about it or any of the equipment in it (R. 236-238, 345); there has never been an injury from the time it was built in 1925 until LaVerl Johnson received an injury in 1950 (R. 283).

This theme reiterated with minor variations throughout the brief (Resp. Br., pp. 4-5, 13, 26, 31, 36) is based on testimony that is at best merely conflicting in favor of defendant.[1] In passing on the correctness

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[1] On analysis, the respondent's record citations fall short of supporting the inferences it here urges and was able to persuade the court below to accept:

As to conformity of construction to standards in 1925.—As the petition points out (p. 39), under Idaho law the standard of required "ordinary care" is "what a reasonably prudent man would do under like circumstances" and is not concluded by prevailing custom or the fact that the station was "standard" at the time it was built.

As to absence of accident for 25 years.—The mere failure of an obviously dangerous trap to catch a victim for twenty-five years can have but little evidential weight. See Morris, Proof of Safety History in Negligence Cases, 61 Harv. L. Rev. 205, 210, 214, 222-223, 234-235. Respondent received the full benefit of this evidence in having it considered by the jury.

As to ability of the substation "to receive electrical energy safely".—Respondent places great store on this testimony but scrutiny shows it was addressed, not to the question of safety of persons in the enclosure, but narrowly to whether the substation and equipment were safe "for the delivery of electrical energy" (R. 236), "capable of receiving electrical energy safely" (R. 237), "whether or not that substation was operating effectively so far as delivering electrical energy to it" (R. 345).

This distinction was emphasized in the examination of Mr. Gilbert to which respondent cites (R. 237):

> "Q. Can you state whether or not it was capable of receiving safely energy that was being delivered to it?
>
> "A. Yes sir, that could be delivered safely as long as the gate was locked, am I making myself clear?" (Emphasis supplied)

That the linguistic and grammatical distinction was intentional is confirmed by the same witness's further testimony (R. 239):

> "No man should have been in that yard unless he was qualified. The wires were low and there was a possible chance of tripping or falling or reaching to them, that is a hazard that we watch if there is anything hot and a man is in the yard."

of the denial of the motion for directed verdict and for judgment notwithstanding the verdict, the court below obviously could not, in conformity with the rule established by this Court, even consider, much less accept such evidence for respondent as against the conflicting testimony for plaintiff. No more may it be relied on now to support the appellate court's reversing judgment.

RESPONDENT'S ARGUMENTS ON OTHER GROUNDS TO SUPPORT THE DECISION BELOW ARE WITHOUT MERIT

Respondent fails to compare the appellate court's fact findings with plaintiff's evidence but argues (Resp. Br., pp. 31-32) that failure of the respondent to withhold electrical energy until the arresters in the substation were barricaded or put higher, out of reach, imposed no liability on it because—

> "when [plaintiff] Johnson went into it he would have gotten to the same wire of the arrester in some manner because he thought he was to paint all the bare wires." (Resp. Br., p. 32)

This is vitiated by petitioner's testimony (R. 227):

> "No, he [H. O. Johnson] said to paint all of *the wires that I could reach.*" (Emphasis supplied)

Respondent also attacks the materiality of evidence of absence of signs calling attention to the fact the pole-top switch did not operate the arrester disconnects (Resp. Br., p. 32). Such absence obviously aggravated the unreasonable risk created by the misleading hook-up of the pole-top switch and the unprotected 12,500 volt wires to the lightning arresters.

The National Electrical Code safety provisions adopted by Idaho statute in 1947 were not only applicable to Pacific Fruit (Resp. Br., p. 32) but as well pertinent on the question of what was ordinary care by respondent, as a prudent man, to eliminate the unnecessary danger, thus officially recognized, and known to respondent to exist in this particular substation.

It is next argued (Resp. Br., p. 33) that because a substation is necessarily dangerous in character, respondent cannot be held liable even though it supplied electricity in death-dealing voltages with knowledge that, over and above the inherent dangers, the easily-remedied hazardous design and construction of the substation subjected all persons, including non-electricians, who it knew were occasionally sent into the enclosure by the customer, Pacific Fruit, to unnecessary risk of grave injury or death from the current it supplied. Clearly foreseeable was the probability that injury would occur through ignorance or momentary lapse, either of the person injured or of some third person in failure to disconnect the lightning arresters, in forgetting that they were not disconnected, in assuming that they were disconnected or failing to warn that they were not disconnected. The court of appeals recognized no such rule as respondent lays down and it is a commonplace that occasional negligence "is one of the ordinary incidents of human life and therefore to be anticipated, particularly if there is little or no utility in the creation of the situation and the harm likely to be done is something more than trivial." 2 Restatement, Torts, sec. 302, comment l, p. 821.

Relation to Independent Contractor

Petitioners cited *Joslin* v. *Idaho Times,* 60 Idaho 235, 91 Pac. 2d 386, as further evidence that the court of appeals might have reached a different conclusion had it considered Idaho decisions. Respondent now urges that under cited sections of the Idaho Workmen's Compensation Law, it is to be regarded as the proprietor or operator of petitioner's business and hence, within the meaning of the law the employer of the petitioner and exempt from common law action (Resp. Br., pp. 37-38). However, Idaho decisions do not support this argument.

As pointed out in *Gaulden* v. *Southern Pac. Co.,* 78 F. Supp. 651 (N. D. Cal. 1948) aff'd 174 F. 2d 1022, (9th Cir. 1949) the two companies here involved are engaged in different businesses: One is a common carrier, the other in the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities. Pacific Fruit is an independent contractor not engaged exclusively in performing such services for the respondent. It rents its cars to other common carriers and also provides heater and refrigerator protection to other carriers.

Idaho Code, Section 72-1010 does not operate if the contractor is in an independent business and not engaged exclusively in performing the proprietor's work. See *Fisk* v. *Bonner Tie Co.,* 40 Idaho 304, 232 Pac. 569, 571. Furthermore, the contractee to be charged as an employer under section 72-1010 must be shown to be the proprietor or operator of the business being carried on by the contractor. *Moon* v. *Ervin,* 64 Idaho 464, 133 P. 2d 933, 935. The work being done by the employee at the time of the injury must pertain

to the business, trade or occupation of the third person sought to be charged as employer. *Palmer* v. *J. A. Terteling & Sons,* 53 Idaho 170, 16 P. 2d 221, 223; see *Jones* v. *Packer John Mines Corp.,* 60 Idaho 653, 95 P. 2d 572, 573.

For these reasons respondent does not come within the statutes it cites, as is confirmed by its failure so to plead in this case.

Other Points Urged in Respondent's Brief Are Not Pertinent

The other grounds suggested by respondent for sustaining the decision of the court of appeals were either rejected by that court or not passed upon. None of them cures or makes moot the errors of which petitioners complain nor constitutes ground for denying certiorari. While this Court has power on certiorari to direct such disposition of the case as the court of appeals might have made, none of respondent's points independently sustain the action of the court below:

Point 1 (Resp. Br., p. 18). As respondent admits, the court of appeals, specifically rejected respondent's contention that it was not selling electricity to Pacific Fruit (Pet. App., p. 49).

Point 2 (Resp. Br., p. 20). Respondent merely urges as conclusive testimony of its witness that the electrical energy was delivered to Pacific Fruit at the junction pole on the Batiste line. But this was merely a conclusion of a witness who had no better basis for determination of the question, if as good, than did the jury. Since the court below undertook to decide the question where title to the electricity passed (Pet. App., p. 50) the Idaho statutory and decisional law under the Uniform Sales Act became pertinent.

Point 3 (Resp. Br., p. 22). Liability has not been asserted against respondent in its lessor capacity.

Point 4 (Resp. Br., p. 22). This argument is based on respondent's evidence in conflict with petitioners'. Furthermore the cited authorities merely negative any duty to inspect. Some of them specifically recognize duty to shut off the current to privately owned wires and apparatus where, as here, the supplier has actual knowledge of unreasonable risk of injury or death if current continues to be supplied.

Point 5 (Resp. Br., p. 26). This point was resolved against respondent by the court below (Pet. App., p. 52).

Points 6 and 7 (Resp. Br., pp. 29-30). These points both deal with causation which the court noted as a question but refused to pass upon (Pet. App., p. 52 note).

CONCLUSION

The record remains clear that the court of appeals failed even to recognize the applicable law and proceeded to retry the facts in derogation of petitioners' right to a jury trial. It failed even to consider the facts adduced in support of petitioners' claim and instead tested the verdict solely by reference to an interpretation in favor of respondent of what was, at best, merely conflicting evidence for respondent. Its failure to consider Idaho decisions is also manifest.

Most significantly, respondent in this Court does not attempt to show that the court below did follow the correct rule of law in exercising its review function. Neither does respondent attempt to show that, evaluated with due regard for that rule, petitioners' evidence was inadequate as a matter of law to sustain

the verdict. Instead respondent merely clings tenaciously to its own interpretation of evidence most favorable to it as the premise for the arguments here advanced.

Since these undefended errors of the court below clearly violate petitioners' right to jury trial as well as the Rules of Decision Act, it is submitted that there is clearly presented appropriate occasion for the exercise of this Court's certiorari jurisdiction.

Respectfully,

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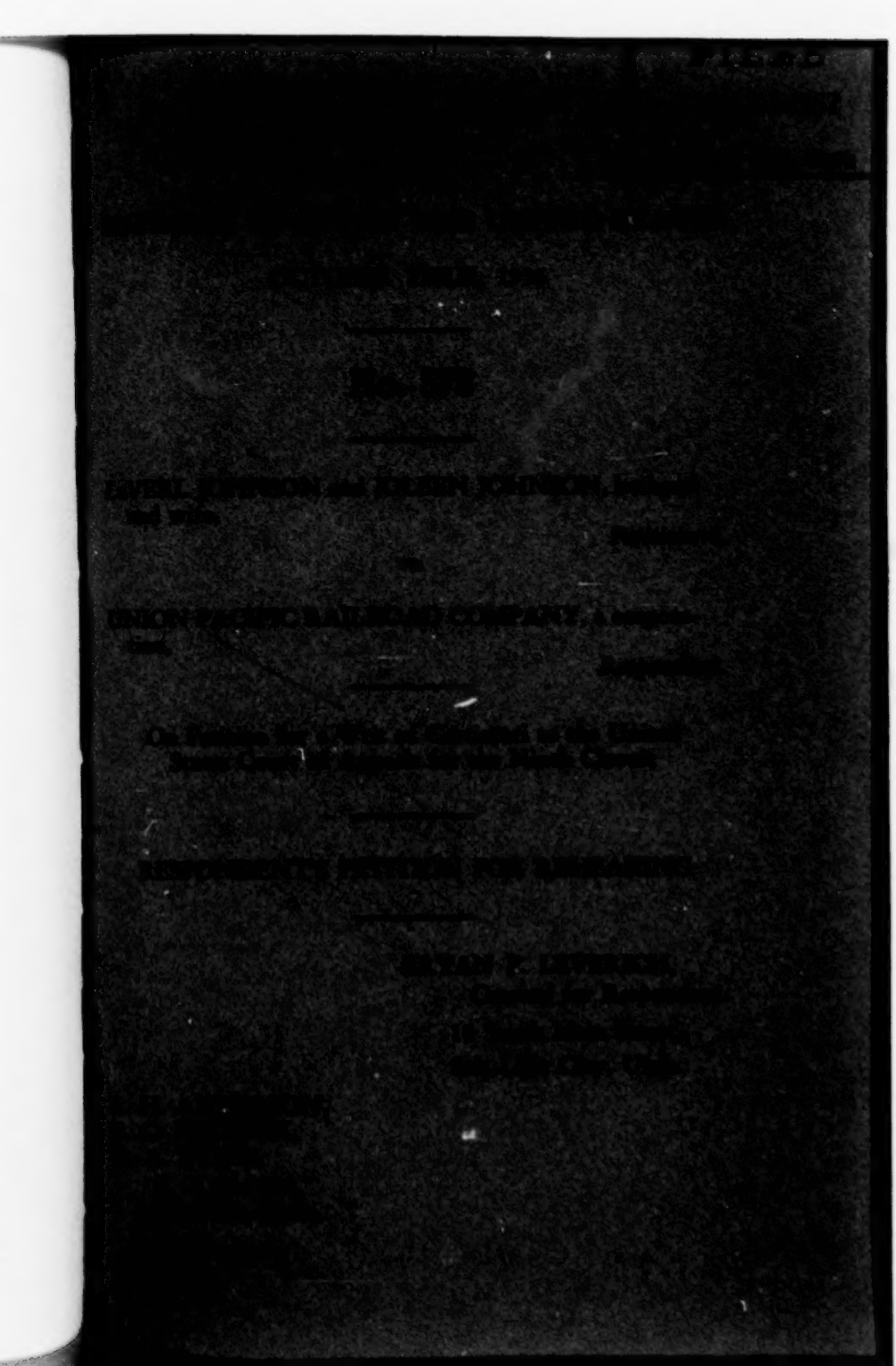

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 573

LaVERL JOHNSON and JOLEEN JOHNSON, husband and wife,

Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S PETITION FOR REHEARING

Union Pacific Railroad Company, respondent herein, respectfully prays for a rehearing or reconsideration of the Order of this Court dated January 14, 1957, granting the Petition for Writ of Certiorari herein and reversing the judgment of the Court of Appeals for the Ninth Circuit on authority of *Russell* vs. *City of Idaho Falls,* No. 8431, decided by the Supreme Court of Idaho December 24, 1956, and in support of said Petition respectfully shows:

I.

The Order of this Court dated January 14, 1957 was entered before Respondent was afforded any real opportunity to answer Petitioners' argument based on the decision of the Supreme Court of Idaho in the case of *Russell* vs. *City of Idaho Falls;* and the majority opinion of this Court . . . misinterprets the effect of the decision of the Idaho Supreme Court in *Russell* vs. *City of Idaho Falls,* referred to in said Order of January 14, 1957, and the Court accordingly erred in reversing the Judgment of the Court of Appeals for the Ninth Circuit.

STATEMENT

On January 12, 1957, respondent received Petitioners' Supplemental Brief, attached to which was the full opinion of the Idaho Supreme Court in Case No. 8431, designated *Beatrice P. Russell and Walter C. Musgrave, State Insurance Manager, State of Idaho, Plaintiffs-Appellants,* vs. *City of Idaho Falls, a municipal corporation, and Union Pacific Railroad Company, a corporation, Defendants-Respondents,* decided December 24, 1956. On the same day Respondent's counsel wrote a letter to Mr. John T. Fey, Clerk of this Court, with a copy to Mr. William D. Donnelly, of Counsel for Petitioners, which letter in part reads as follows:

> "Not knowing whether we have the right to respond to Petitioners' Supplemental Reply Brief, a copy of which Mr. Leverich received today, or whether, if we might respond, there is time to do so, I hasten to write you this letter, with the approval of Mr. Leverich and over his signature, because we don't want the Court to conclude by our silence that we agree the *Russell* case referred to in Petitioners' Supplemental Brief is favorable to petitioners or is

> against our position in the case at Bar. It is not. We submit it does not support the position of petitioners but does in fact support respondent's position, and if petitioners' Supplemental Brief is to be considered by the Court we would appreciate it if the Court could also have our comments which follow. Whatever expense there might be in doing so we will, of course, be glad to pay."

Our comments which followed are somewhat enlarged herein.

On January 19, 1957, Mr. L. H. Anderson, of counsel for respondent, received a letter from Mr. E. P. Cullinan, Assistant Clerk of this Court, dated January 15, 1957, which reads as follows:

> "Your letter of January 12th reached this office on January 14th, too late to present to the Court before its rendition of the per curiam order in the above-entitled case."

ARGUMENT

We will discuss the *Russell* decision under two headings:

1. *The Russell case does not support the theory that the Railroad was negligent as to Johnson in the case at bar; and*

2. *The Russell case supports the Railroad and not the Johnsons.*

1.

The Russell case does not support the theory that the Railroad was negligent as to Johnson in the case at bar.

In the *Russell* case the Stockyards Company at its own expense constructed the office building and barn, such con-

struction including the wiring and installations in said buildings. In so doing so no ground or fuses were provided at the barn although apparently required, and the ground wire at the office building should have been attached to the water pipe instead of the driven ground rod. It was accordingly a definite and certain defective or negligent installation. Also, the City's transformer was defective; it had been rendered defective by an electrical storm on August 12, 1954, or about three weeks prior to the time Russell was electrocuted. The defect is clearly set out by the Court on page 3 of its decision.

The City of Idaho Falls was not only generating but was delivering the energy to the lines of the Stockyards Company, while in the case at bar we submit the Idaho Power Company rather than the Railroad Company was the supplier of the energy; the Railroad was neither generating nor selling power to the Pacific Fruit Express Company. *See Point 1 of Respondent's Brief.* The Express Company was merely permitted to attach its line onto the Railroad line and obtain power from the same source as the Railroad obtained its power, to-wit: from the Idaho Power Company.

The Express Company obtained this power at the railroad line across the tracks from the Express Company's substation and from there to the substation it was the Express Company's power, was under its control and owned by it. *See Point 2 of Respondent's Brief.*

In the case at bar, as distinguished from the *Russell* case, there was not a defect of any kind at any place and the substation was standard when built in about 1925, and continued without defects up to and at the time of Johnson's injuries to be safe and capable of receiving electrical energy

and performing safely the functions for which it was built, to-wit: a substation. *See Point 4 of Respondent's Brief.*

Such is not true with respect to the situation in the *Russell* case. In that case the electrical appliances at the office building, and particularly at the metal barn, were never standard or safe but were from the time of their installation always defective, as we have pointed out.

The barn and office building in the *Russell* case were not surrounded by a high wire fence or locked as was the substation in the case at bar, with the only two keys in possession of the officers of the Pacific Fruit Express Company. In the *Russell* case there was no way for anyone operating the stockyards or at the stockyards to make the premises at or around the barn safe on the morning of the accident as there was in the *Johnson* case. In the *Johnson* case all that was necessary to have made the substation safe was to disconnect the switches leading to the lightning arrestors, which was the duty and obligation of the owner and operator of the substation, to-wit: the Pacific Fruit Express Company; its officer was the one who gave Johnson the key and sent him in alone, all without any knowledge whatsoever on the part of the Railroad Company.

Now, let us see what the Idaho Court decided in the *Russell* case. The Court clearly was not dealing with a situation such as existed in the case at bar; it had a factual situation where the electric lines to which energy was being furnished were defective. The Court did not have before it, nor did it discuss, a situation where energy was being delivered to a substation or anything similar, where the equipment or appliances were not defective, or a situation where the appliances and equipment were capable of receiving energy

safely and performing properly; or where, if the appliances were operated properly, as they had been for twenty-five years, no accident would have occurred. The Court was dealing with a situation where the equipment to which energy was being supplied was defective or was negligently installed, which equipment was supplying energy to places that were not enclosed with a high fence and locked. The court was not concerned with a situation where an employee was sent into a place alone which was dangerous *only* because some switches could and should have been pulled which would have made the place entirely safe. Neither was the Court dealing with a situation where the National Electric Code did not apply. *See page 32 of Respondent's Brief.*

• In the *Russell* case the situation at the barn was always dangerous because of defective and negligent wiring, and particularly when a defective transformer belonging to the City forced an excessive amount of energy through the lines and into the buildings. There is nothing of the sort in the case at Bar.

Because of the facts which existed in the *Russell* case but do not exist in the case at bar, the Court's opinion is now understandable. For instance, when the Court discusses Appellants' Requested Instruction No. 15, on page 9, it makes a statement that one furnishing electricity must refuse to do so where it is known, or in the exercise of reasonable care should have been known "that the wiring or appliances of the customer are not safe". (We again submit that the Railroad was not supplying the electricity in the case at bar but that it was being furnished by the Idaho Power Company, see Point 1 of Respondent's Brief.) The Court without a doubt had reference to defects or negligent manner of in-

stallations when it used the words "not safe" because all the authorities cited to support the statement are cases based upon some defect in the lines or equipment. The Court was not referring to a situation where the equipment, as in the case at bar, was neither defective nor negligently installed.

Following the citation of the cases the Court said that the rule just referred to "does not apply and the trial court properly refused so to instruct the jury, because the proof fails to show that the City either had knowledge of the *defects* in the customer's wiring and installations or should have known thereof." (Emphasis ours.) Then the court said:

> "Appellants assign error of the trial court in giving Instruction No. 17 to the effect that a supplier of electricity is not responsible for the condition of a customer's lines unless it has actual knowledge that the lines are *defective;* also that the supplier is not required to inspect the customer's lines at the time of connection or thereafter.
>
> "Such instruction states the rule announced by the weight of authority, and therefore the trial court properly gave it." (Emphasis ours.)

and cites authorities to support that statement. These cases all refer to some defect in appliances or equipment as stated above and affirm the rules set forth in Point 4 of Respondent's Brief.

The Court cites *29 C. J. S.* 611, Sec. 57, which affirms the statement in *134 A. L. R.* 507, also cited, that in the absence of knowledge of *defects* the supplier is not liable for injuries to persons or property of the consumer who owns, controls or maintains such wires or appliances (page 508).

Particularly applicable also to the situation in the case at bar is the statement in 29 C. J. S. Section 57, cited by the Court, which reads as follows:

> "* * * but, where defendant retains or exercises no control, the fact that the apparatus was originally supplied, sold, or installed by defendant imposes no liability, unless the work as originally done was improper or imperfect and the injury resulted from that cause."

In the *Russell* case the work originally done was improper or imperfect. In the case at bar it was properly and perfectly done and continued to be thoroughly safe and adequate to receive power or energy and became unsafe only because of the manner in which the substation was operated by the Pacific Fruit Express Company, the owner and operator thereof.

Illustrating what the Court was referring to in the *Russell* case are two other authorities it cites—*Jelf* vs. *Cottonwood Falls Gas Company* (Kans.) 178 Pac. (2d) 992, and *Koch* vs. *Telluride Power Company* (Utah) 209 Pac. (2d) 241.

In the *Jelf* case there was a gas explosion and judgment for the defendant was affirmed. The defendant had notice of gas leaks and that the supply of gas was escaping into the residence of the plaintiff, and in that case the court said:

> "It was defendant's duty to properly inspect and to properly keep in repair its own pipes, fittings, etc. It was also defendant's duty to properly inspect the customer's pipes, connections, and appliances, after having sufficient notice of a leak or leaks therein."

The condition referred to in that case was dangerous because of defects and not otherwise. Suppose there were no leaks or defects but the owner so operated the appliances in his house as to cause damage, neither he nor another in the house could have held the defendant liable. The latter is not supposition when applied to the case at bar.

In the *Koch* case the hazardous or unsafe condition was a *defective* transformer; judgment for defendant was affirmed and the court said:

> "* * * the negligence in this case was not in permitting the current to charge the wires of the defendant company up to the utility pole but was in closing the circuit so that the current could flow into the defective transformer without taking precautions to protect persons who might have cause to be in close proximity to the transformer."

Likewise, in the case at bar, the energy going into the substation presented nothing more than a condition. The cause of the accident was the manner in which the Pacific Fruit Express Company operated the substation, particularly in failing to disconnect the switches to the lightning arrestors.

The *Russell* case does not change the rule of law laid down by the Idaho Supreme Court set forth in Point 3 on page 22 of Respondent's Brief; neither does it modify in any respect any other Idaho cases.

The Railroad had leased the premises to the Pacific Fruit Express Company and any liability resulting from the operation of the substation would be that of the lessee, Pacific Fruit Express Company.

Thus we submit that the *Russell* case is not controlling in the case at bar with reference to whether the Railroad

was negligent. The *Russell* case is based upon facts entirely different and the authorities the Court cites positively and directly affirm and support the legal propositions set forth by Circuit Judge Chambers in the case at bar on page 431 of the decision in 233 Fed. (2d).

2.

The Russell case supports the Railroad and not the Johnsons.

The *Russell* decision absolutely establishes that under the facts in the case at bar the Railroad was a statutory employer under the Idaho Workmen's Compensation Act for the reasons discussed on pages 37-38 of Respondent's Brief.

In the *Russell* case the Stockyards Company was performing service for the Railroad in taking care of and feeding livestock; and in the *Johnson* case the Pacific Fruit Express Company was furnishing cars, heater and refrigerator service for the Railroad (R. 314, 359-360). The substation where Johnson was injured was used in the performance of that work.

In the *Russell* case, Russell, with an employee named Jorgensen, on the morning Russell was electrocuted, was feeding sheep which had been trucked in by individuals and later delivered to the Commission Company (the sheep had not come in by rail), and "during a lull in their work" went to the office of their employer and a short time thereafter Russell left and was found electrocuted at the northeast corner of the metal barn. The Court said:

> "It thusly appears that the work being performed by Russell and Jorgensen relating to those particular

sheep at the time in question was of intrastate classification covered by the workmen's compensation law.

> "We conclude that respondent Railroad Company was the statutory employer of decedent Russell at the time of his fatal accident, pursuant to the provisions of I. C. sec. 72-1010, a part of the workmen's compensation law. That section provides that 'employer' includes 'the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workman there employed.' " (Citing Idaho cases.)

following which the Supreme Court stated that the trial court properly granted the Motion for a Directed Verdict in favor of the Railroad.

The premises on which the Pacific Fruit Express Company performed service for the Railroad were leased by the Railroad to the Express Company; it performed the service for the Railroad, and even though the Express Company be classed as an independent contractor, the statutes, to-wit: Sections 72-811 and 72-1010 of the Idaho Code, set forth in the Appendix of Respondent's Brief, together with the decisions of the Idaho Supreme Court thereunder, including the *Russell* decision, make the Railroad in the case at bar a statutory employer and not subject to a common law action based on negligence.

CONCLUSION

Respondent prays that its Petition for Rehearing be granted, that the Petition for Writ of Certiorari be denied or that the Judgment of the Court of Appeals of the Ninth Circuit be affirmed.

Respectfully submitted,

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10 South Main Street,
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Dated:

January 29, 1957.

L. H. ANDERSON,
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P. O. Box 530,
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Of Counsel.

CERTIFICATE OF COUNSEL

The undersigned, Bryan P. Leverich, Attorney for Respondent, hereby certifies that the Petition for Rehearing filed in this cause is presented in good faith; that in his judgment said Petition is restricted to the grounds specified in paragraph 2 of Rule 58, and that said Petition for Rehearing is not imposed for delay.

BRYAN P. LEVERICH,
Counsel for Respondent.

740], decided by the Supreme Court of Idaho, December 24, 1956. The case is remanded to the Court of Appeals for proceedings consistent with this holding. MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE HARLAN would not grant the petition for writ of certiorari, but in any event, upon its being granted, would vacate the judgment of the Court of Appeals and remand the case for reconsideration by that court in light of the decision of the Supreme Court of Idaho in the case of *Russell* v. *City of Idaho Falls*, [*supra*], decided by the latter court December 24, 1956, after the decision in the present case. *William D. Donnelly* for petitioners. *Bryan P. Leverich* for respondent. Reported below: 233 F. 2d 427.

No. 573. JOHNSON ET AL. *v.* UNION PACIFIC RAILROAD CO. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed on the authority of *Russell* v. *City of Idaho Falls*, No. 8431 [78 Idaho ——, 305 P. 2d

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